

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

CHARLES RUSSELL;  
CHRISTOPHER HUBBARD;  
HARRY WHITE; CARL  
SMELLEY; SHANE CARLINE;  
and COURTNEY WHITE,  
individually and on behalf of all  
others similarly situated,

Plaintiffs,

v.

WAYNE COUNTY, MICHIGAN;  
BENNY NAPOLEON, in his official  
capacity as Sheriff of Oakland County;  
DANIEL PFANNES, in his official  
capacity as the Undersheriff for the  
Wayne County Sheriff's  
Office; ROBERT DUNLAP, in his  
official capacity as Chief of Jails and  
Court Operations; JAMES E. DAVIS,  
in his official capacity as Deputy Chief  
of Jail Operations,

Defendants.

Case No. 2:20-cv-11094-MEG-  
EAS

**PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs hereby move this Court, pursuant to Federal Rule of Civil Procedure 65, for a temporary restraining order. The grounds for this motion are set forth in the Brief in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, filed herewith, and the accompanying Declarations and

Exhibits in support.

Because of the imminent and grave risk of serious illness and death from continued confinement at the Wayne County Jail (“Jail”), Plaintiffs request that this Court consider this motion on an emergency basis and that the Court grant a temporary restraining order requiring the release of members of the Medically Vulnerable Subclass pending briefing and argument.

Plaintiffs further request that the Court issue a temporary restraining order requiring Defendants to immediately undertake the following minimum measures to improve the hygiene and safety at the Wayne County Jail:

- 1) Effectively communicate to all people incarcerated, including low-literacy and non-English-speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices to reasonably ensure that individuals are able to take precautions to prevent infection;
- 2) Provide adequate spacing of six feet or more between people incarcerated, so that social distancing can be accomplished;
- 3) Ensure that each incarcerated person receives, free of charge: (1) an individual supply of liquid hand soap and paper towels sufficient to allow frequent hand washing and drying each day, and (2) an adequate supply of disinfectant hand wipes or other products effective against the virus that causes COVID-19 for daily cleanings;
- 4) Ensure that all incarcerated people have access to hand sanitizer containing at least 60% alcohol;
- 5) Provide an adequate stock of daily cleaning supplies, such as sponges, brushes, disinfectant hand wipes, and/or disinfectant products effective against the virus that causes COVID-19;
- 6) Provide sufficient disinfecting supplies, free of charge, so incarcerated people

- can clean high-touch areas or items (including, but not limited to, telephones, tablets, tables, bathrooms, seating, and door handles) between each use;
- 7) Provide daily access to clean showers and clean laundry, including clean personal towels and washrags for each shower;
  - 8) Require that all Jail staff wear personal protective equipment, including masks and gloves, when interacting with any person or when touching surfaces in cells or common areas;
  - 9) Require that all Jail staff wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol both before and after touching any person or any surface in cells or common areas;
  - 10) Take each incarcerated person's temperature daily (with a functioning, properly operated, and sanitized thermometer) to identify potential COVID-19 Infections.
  - 11) Conduct immediate testing for anyone displaying known symptoms of COVID-19 and who has potentially been exposed to infection;
  - 12) Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined in a non-punitive setting, with continued access to showers, recreation, mental health services, reading materials, phone and video calls with loved ones, communications with counsel, and personal property;
  - 13) Respond to all emergency (as defined by the medical community) requests for medical attention within an hour;
  - 14) Waive all medical co-pays for those experiencing COVID-19-related symptoms; and
  - 15) Cease and desist retaliatory disciplinary action in response to (a) incarcerated persons' requests for medical attention and basic, necessary protections, and/or (b) efforts by incarcerated persons to publicize unsafe and life-threatening conditions inside the Jail.

In addition, Plaintiffs request that this Court immediately order Defendants to provide Plaintiffs and the Court with the following lists in preparation for any

hearing on Plaintiffs' Motion for Temporary Restraining Order:

- 1) All individuals currently detained in the Jail, including their location, charge, bond or sentence status, and any reported comorbidities that would place them within the Medically Vulnerable Subclass, as defined in paragraph 110(c) of Plaintiffs' Complaint; and
- 2) Any individuals with reported comorbidities that would place them within the Medically Vulnerable Subclass whom Defendants object to releasing and the basis for that objection.

Lastly, Plaintiffs request that the Court 1) set an evidentiary hearing to examine allegations in Plaintiffs' emergency motion for a Temporary Restraining Order and Preliminary Injunction; 2) set a time and date for a hearing in which the Court will resolve any disputes about whether certain listed individuals are entitled to relief; 3) order an inspection of the Jail facilities by a medical expert in infectious disease who can report to the Court about the conditions at issue and answer critical questions at the hearing; and 4) grant leave to conduct limited expedited discovery, about which the parties can confer.

Local Rule 7.1(a) requires Plaintiffs to ascertain whether this motion will be opposed. Because this motion is being filed contemporaneously with the complaint, there is not yet an attorney of record for Defendants in this case. Plaintiffs' counsel emailed and left a voicemail with the Wayne County Corporation Counsel's office

and the Wayne County Sheriff's Office counsel to explain the nature of this motion and its legal basis. Plaintiffs' counsel was unable to reach Wayne County Corporation Counsel. David Melton, on behalf of the Wayne County Sheriff's Office, indicated that he does not concur in the motion.

Plaintiffs' counsel is prepared to appear by telephone immediately. Each day that passes risks Plaintiffs' lives. This case cannot wait.

Dated: May 4, 2020

Respectfully submitted,

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Defendants.

Case No. **X**

**BRIEF IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

INTRODUCTION .....1

BACKGROUND AND FACTS .....2

    A. The Three Divisions of the Jail House Numerous People Who Are  
        Currently at Risk of Contracting COVID-19.....6

    B. Defendants maintain dangerous conditions at the Jail by failing to  
        practice critical social distancing techniques or properly sanitize  
        high-contact Jail facilities. ....7

    C. Defendants do not provide basic personal hygiene supplies to  
        detainees.....11

    D. Jail staff do not consistently wear protective gear, putting detainees  
        further at risk.....12

    E. Defendants are failing to properly treat and quarantine detainees who  
        test positive. ....13

    F. Defendants are failing to provide adequate and timely medical care. 15

    G. Defendants are failing to test detainees who are symptomatic or who  
        have been in close proximity to individuals who have tested  
        positive. ....17

    H. Defendants fail to provide information about COVID-19 and its  
        spread, instead misleading detainees to believe they are *safer*  
        within the Jail. ....19

    I. Defendants do not properly screen individuals entering the Jail,  
        exacerbating the potential for viruses to infiltrate the Jail.....20

ARGUMENT .....22

    A. Plaintiffs are objectively at a substantial risk of harm. ....25

    B. Defendants have acted and are continuing to act with subjective  
        indifference towards Plaintiffs’ substantial risk of harm.....29

CONCLUSION .....41

## TABLE OF AUTHORITIES

### Cases

<i>ACLU of Ky. v. McCreary Cty., Ky.</i> , 354 F.3d 438 (6th Cir. 2003) .....	37
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979) .....	26
<i>Brown v. Bargery</i> , 207 F.3d 863 (6th Cir. 2000).....	25
<i>Brown v. Plata</i> , 563 U.S. 493, 531-32 (2011) .....	26
<i>Cameron v. Bouchard</i> , No. 20-cv-10949, 2020 WL 1929876 (E.D. Mich. Apr. 17, 2020).....	38
<i>Castillo v. Barr</i> , ___ F. Supp. 3d ___, CV 20-00605 TJH (AFMx), 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020).....	38
<i>City of Dearborn v. Comcast of Mich.</i> , 558 F. Supp. 2d 750 (E.D. Mich. 2008)....	23
<i>City of Revere v. Mass. Gen. Hosp.</i> , 463 U.S. 239 (1983) .....	24, 26
<i>DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.</i> , 489 U.S. 189 (1989).....	26
<i>Dodds v. U.S. Dep’t of Educ.</i> , 845 F.3d 217 (6th Cir. 2016).....	39
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976) .....	24, 25, 26
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994).....	24, 25, 27, 33
<i>Flanory v. Bonn</i> , 604 F.3d 249 (6th Cir. 2010) .....	27
<i>G &amp; V Lounge, Inc. v. Mich. Liquor Control Comm’n</i> , 23 F.3d 1071 (6th Cir. 1994).....	39
<i>Helling v. McKinney</i> , 509 U.S. 25 (1993) .....	27, 28, 30, 37
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002) .....	30
<i>Hopper v. Phil Plummer</i> , 887 F.3d 744, 752 (6th Cir. 2018).....	25
<i>In re DeLorean Motor Co.</i> , 755 F.2d 1223 (6th Cir. 1985).....	23
<i>Johnson v. Operation Get Down, Inc.</i> , No. 11-15487, 2014 WL 3752481 (E.D. Mich. 2014) .....	27
<i>Jolly v. Coughlin</i> , 76 F.3d 468 (2d Cir. 1996).....	27
<i>Kingsley v. Hendrickson</i> , 576 U.S. 389, 135 S. Ct. 2466 (2015) .....	25, 26
<i>Lee v. Birkett</i> , No. 09–cv–10723, 2010 WL 1131485 (E.D. Mich. Feb. 18, 2010) 28	
<i>Malam v. Adducci</i> , ___ F. Supp. 3d ___, 2020 WL 1672662 (E.D. Mich. Apr. 6, 2020).....	36
<i>Ohio Republican Party v. Brunner</i> , 543 F.3d 357, 361 (6th Cir. 2008).....	23
<i>Richko v. Wayne Cty., Mich.</i> , 819 F.3d 907 (6th Cir. 2016).....	24, 26
<i>Richmond v. Huq</i> , 885 F.3d 928 (6th Cir. 2018).....	30
<i>Thakker v. Doll</i> , ___ F. Supp. 3d ___, 2020 WL 1671563 (M.D. Pa. Mar. 31, 2020)33	
<i>United States v. Garlock</i> , No. 18-Cr-00418, 2020 WL 1439980 (N.D. Cal. Mar. 25, 2020).....	38
<i>Wilson v. Gordon</i> , 822 F.3d 934 (6th Cir. 2016) .....	38
<i>Wilson v. Seiter</i> , 501 U.S. 294 (1991) .....	26, 30

*Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).....23  
*Youngberg v. Romeo*, 457 U.S. 307 (1982) .....26  
*Zhang v. Barr*, No. ED CV 20-00331-AB, 2020 WL 1502607 (C.D. Cal. Mar. 27, 2020).....38

**Statutes**

28 U.S.C. § 2241 .....2, 23  
42 U.S.C. § 1983 .....2, 23

## INTRODUCTION

An outbreak of the novel coronavirus is occurring in the Wayne County Jail (“Jail”), where Defendants confine approximately 850 human beings in life-threatening conditions. Plaintiffs sleep as close as one foot from each other, have limited or no access to hygiene products and cleaning supplies, are not properly quarantined when sick, and, upon information and belief, do not have access to medical care or equipment anywhere near sufficient in quality or volume to respond to a COVID-19 outbreak when—not if—it occurs. Many people confined at the Jail are medically vulnerable to the COVID-19 disease, and their lives are at risk. As of April 24, 2020, COVID-19 has taken the lives of 2 contracted Jail physicians and 2 deputies, and 177 Wayne County Sherriff’s Office employees and 13 detainees have contracted the disease. *See* Compl. ¶ 4. Because social distancing cannot be meaningfully implemented at the current population levels and the Jail has failed to implement additional basic mitigating measures, this number will multiply exponentially at a rapid pace. *See* Compl. Ex. 14, Declaration of Dr. Adam Lauring (“Lauring Decl.”) ¶¶10, 30-39, 45.

As COVID-19 spreads inside and outside the Jail, time is running out to save Plaintiffs’ lives and to prevent the Jail from becoming an epicenter of community infection. Plaintiffs seek two forms of immediate relief. First, Plaintiffs seek class-wide relief requiring Defendants to take critical steps inside the Jail to

safeguard people who, due to the nature of their confinement, are at serious risk of infection, illness, or death as the result of a global pandemic. Second, Plaintiffs seek immediate release from confinement for a subclass of people who, because of age or preexisting medical conditions, are at particularly grave risk of death from COVID-19—a risk that cannot be sufficiently mitigated by safeguards or preventive measures in the Jail. This relief is appropriate either through 28 U.S.C. § 2241 or, in the alternative, through 42 U.S.C. § 1983.

This extraordinary moment requires the Court’s immediate intervention. The “horizon of risk for COVID-19 in this facility is a matter of days, not weeks.” Lauring Decl. ¶ 45. Immediate relief is also in the public interest. A rapid outbreak within the Jail population would drain the Detroit metropolitan area of limited healthcare resources, including ventilators. For these reasons, and for the reasons explained further below, the Court should grant Plaintiffs’ motion for temporary restraining order.

## **BACKGROUND AND FACTS**

### **I. The COVID-19 Crisis is a Health Crisis Unmatched in Living Memory.**

We are in the midst of an unprecedented public health emergency. *See* Compl. ¶ 29. The number of people infected by COVID-19 has grown exponentially in this country since the first case was identified in January. *Id.* ¶ 32. By March 11, 2020, the World Health Organization defined the outbreak as a global pandemic. *Id.* ¶ 29.

As of May 3, over 1,122,000 people have been diagnosed with COVID-19 in the United States, with over 65,000 deaths confirmed.<sup>1</sup> Without effective public health interventions, the Centers for Disease Control and Prevention (“CDC”) project that as many as 2.2 million Americans will die. *Id.* ¶ 32. This number is sure to rise if conditions in this country’s jails and prisons are not addressed rapidly.<sup>2</sup>

COVID-19 is a highly contagious virus that can severely damage lung tissue, impede cardiac functions (causing heart failure), and permanently harm other organs. *Id.* ¶ 33. The experience of a severe case of COVID-19 has been compared to “drowning in [one’s] own blood.” *Id.* ¶ 34. Approximately 20% of people infected experience life-threatening complications; between 1% and 3.4% die. *Id.* ¶ 36. The fatality rate is about ten times higher than a severe seasonal influenza, even in countries with highly effective health care systems. *Id.* Complications manifest at an alarming pace, and the required levels of medical support—which include highly specialized equipment like ventilators as well as an entire team of care providers—

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<sup>1</sup> See Centers for Disease Control & Prevention, *Coronavirus 2019: Cases in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited May 4, 2020).

<sup>2</sup> See Lisa Freeland, David Patton, & Jon Sands, *We’ll see many more covid-19 deaths in prisons if Barr and Congress don’t act now*, Wash. Post (Apr. 6, 2020), <https://www.washingtonpost.com/opinions/2020/04/06/covid-19s-threat-prisons-argues-releasing-at-risk-offenders/>; Udi Ofer & Lucia Tian, *New Model Shows Reducing Jail Population will Lower COVID-19 Death Toll for All of Us*, ACLU (Apr. 22, 2020), <https://www.aclu.org/news/smart-justice/new-model-shows-reducing-jail-population-will-lower-covid-19-death-toll-for-all-of-us/>.

have been rapidly overwhelming hospitals nationally and globally. *Id.* ¶ 35.

Although everyone is at risk of contracting COVID-19, some populations are at higher risk for severe health outcomes. Certain underlying medical conditions—including lung disease, asthma, chronic obstructive pulmonary disease, chronic liver or kidney disease, diabetes, epilepsy, hypertension, compromised immune systems, blood disorders, inherited metabolic disorders, strokes, and pregnancy—increase the risk for individuals of any age. *Id.* ¶ 33. People over the age of fifty also face greater chances of serious illness or death. *Id.* The only known effective measure to mitigate these more extreme risks is to prevent infection in the first instance. *Id.* ¶ 37.

Accordingly, public health experts and officials urge “social distancing”—isolating oneself from other people at a minimum distance of six feet—as well as frequent hand-washing, use of hand sanitizer, and frequent cleaning and disinfecting of high touch surfaces and objects. *Id.* These measures are particularly important in jail, a congregate setting that can rapidly become a “public health disaster unfolding before our eyes.”<sup>3</sup>

## **II. A COVID-19 Jail Outbreak is an Extreme Threat to Public Health.**

People incarcerated in jail are at heightened risk of infection and death from

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<sup>3</sup> Jan Ransom & Alan Feuer, *We’re Left for Dead: Fears of Virus Catastrophe at Rikers Jail*, N.Y. Times, Mar. 30, 2020, <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html>.

COVID-19. Compl. ¶ 43 (citing the CDC’s guidance for detention facilities). According to public health experts, “the risk posed by COVID-19 in jails and prisons is significantly higher than in the community . . . in terms of risk of transmission, exposure, and harm to individuals who become infected.” Compl. ¶ 40; *see also* Compl. Ex. 2, Declaration of Dr. Jaimie Meyer (“Meyer Decl.”) ¶ 7; Lauring Decl. ¶ 41. This is due to a number of factors, including forced proximity of detained individuals, their inability to protect themselves through social distancing, lack of medical and hygiene supplies, heavy reliance on outside hospitals for serious medical care, forced labor of incarcerated people in cleaning the facilities with insufficient supplies, constant cycling of people through the jails, and inadequate medical care within the jail itself. Compl. ¶ 41.

The growing devastation in jails around the country is a harbinger for what awaits Wayne County. In New York City, less than a month from the detection of the first case at Rikers Island, more than 700 people—including more than 400 jail staff—have tested positive, and two jail officers have died. *Id.* ¶ 47. The COVID-19 infection rate in New York City’s jails is far higher than the rates for the most infected regions of the world. *Id.* Wayne County is only weeks away from a similar explosion.

An outbreak cannot be contained inside the Jail. What happens to the people

trapped inside this “ticking time bomb”<sup>4</sup> affects others who cycle through, including correctional and medical staff. Compl. ¶ 38; Compl. Ex. 1 (“Stern Decl.”) ¶11. The outbreak then spreads to staff’s families and the community. Stern Decl. ¶ 11. Jail outbreaks can quickly overwhelm regional hospitals, making resources unavailable to treat others suffering from COVID-19 or unrelated life-threatening conditions like heart attacks. Compl. ¶ 51; Stern Decl. ¶ 11. As courts have noted, “[t]he more people we crowd into [a] facility, the more we’re increasing the risk to the community.” *United States v. Stephens*, \_\_ F. Supp. 3d \_\_, No. 15-CR-95, 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (internal citation omitted).

### **III. Defendants Are Not Taking Necessary Steps to Prevent A Widespread Outbreak in the Jail.**

#### **A. The Three Divisions of the Jail House Numerous People Who Are Currently at Risk of Contracting COVID-19.**

Division I (the “New Jail”) and Division II (the “Old Jail”) house over 600 detainees, many of whom are members of the Pre-Trial Subclass. Members of this Subclass consistently travel back and forth between Division I, Division II, and the Wayne County Third Circuit Court for arraignment and other pre-trial proceedings. Division III (the “Dickerson Facility”) houses over 430 detainees, and many of these men are part of the Post-Trial Subclass. Some members of this Subclass are serving

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<sup>4</sup> St. Louis Univ., “*Ticking Time Bomb*,” *Prisons Unprepared For Flu Pandemic*, ScienceDaily (2006), <https://www.sciencedaily.com/releases/2006/09/060915012301.htm>.

work release sentences, and they leave and return to the Jail each day and night. Ex. 1 (“C. White Decl.”) ¶ 11. The laundry services for all three Divisions occurs in Division III.

Aggressive measures are required to stop the spread of germs between and within Divisions, as an outbreak of COVID-19 in one part of one Division would all but guarantee a spread of the virus to other detainees and staff. This risk is not hypothetical given the number of Jail staff and detainees who have already contracted COVID-19 and those Jail employees that have already died. Defendants are thus well aware of COVID-19 and its grave risks, but they have failed to undertake the necessary measures to protect detainees from contracting the virus, instead directly placing detainees in harm’s way.

**B. Defendants maintain dangerous conditions at the Jail by failing to practice critical social distancing techniques or properly sanitize high-contact Jail facilities.**

Defendants are not taking basic measures to maintain safe, hygienic conditions at the Jail and are instead creating and perpetuating a dangerous, unsanitary environment that is putting detainees at risk. Within each Division at the Jail, social distancing is impossible. Detainees are confined in cells that are approximately 8 feet by 15 feet and are shared with up to four other people, so it is impossible for detainees to stay more than three feet away from each other. Ex. 2 (“Mathews Decl.”) ¶ 6; C. White Decl. ¶ 3; Ex. 3 (“Nickel Decl.”) ¶ 5. In the four

person-cells, there is one bed on each wall so that each bed is only two to three feet from the others. Mathews Decl. ¶ 6. In other cells, detainees sleep in bunk beds where the top bunk is only a few feet higher than the bottom bunk. Nickel Decl. ¶ 5. Some of the cell walls in Division I, at least, are covered with urine, feces, and vomit. *See* Ex. 4 (“Kelly Decl.”) ¶ 15.

Detainees can eat only in common areas, and deputies often force detainees to sit together at tables that are less than six feet apart, with four to five men per table. C. White Decl. ¶¶ 3, 5. At mealtimes, detainees can be no more than a few feet from one another and must remove their masks to eat, if they have been provided masks at all. Ex. 5 (“Carline Decl.”) ¶ 7; Mathews Decl. ¶ 8; Ex. 6 (“Smelley Decl.”) ¶ 7; C. White Decl. ¶¶ 3, 5; Nickel Decl. ¶ 6; Ex. 7 (“Blanks Decl.”) ¶ 7; Ex. 8 (“Pearson Decl.”) ¶ 6. Most deputies serving food are not wearing masks. Blanks Decl. ¶ 7. Cutlery is handed out in a single bag that is passed between detainees, none of whom have gloves. Nickel Decl. ¶ 9. In addition, detainees must share tablets, phones, and benches when eating or watching TV. Smelley Decl. ¶ 6; C. White Decl. ¶ 3; Nickel Decl. ¶ 6.

The bathrooms and showers the detainees share are themselves unsanitary or often not even functioning. Some sink water is tainted with fecal matter because the sink water is connected to the toilet water. Blanks Decl. ¶ 4, Nickel Decl. ¶ 10. Some sink basins have mold, others are crawling with maggots and bugs, and others

do not function at all. Blanks Decl. ¶ 5; Nickel Decl. ¶ 10. Some showers are unusable, requiring detainees to take “bird baths” instead. Carline Decl. ¶ 6; Ex. 9 (“Russell Decl.”) ¶ 9. The showers that do work are “filthy.” Nickel Decl. ¶ 10. Detainees must share showers, and the shower area is not large enough for detainees to have at least six feet of space between each other. *Id.* ¶ 11.

Detainees with serious underlying medical conditions and other concurrent illnesses, like pneumonia, are housed in general population units such as these where social distancing is impossible. Mathews Decl. ¶ 3; Russell Decl. ¶ 8. Charles Russell, who has stage three prostate cancer<sup>5</sup> and diabetes, lives in a general population unit with 25 other detainees; they are all forced to share three working showers and four working toilets. *Id.* ¶ 8-9. Jail staff continue to bring new detainees into the pod that could put Mr. Russell at risk. *Id.* ¶ 8.

Further, Defendants’ efforts to mitigate the spread of COVID-19 infection by cleaning shared spaces and surfaces are woefully inadequate. Common surfaces that are touched frequently are not cleaned regularly; even when they are cleaned, disinfectant sufficient to kill coronavirus is often not used. Smelley Decl. ¶ 8-10.

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<sup>5</sup> Cancer patients have shown a higher risk of death or severe complications from COVID-19 compared with those without cancer. *See* Laurie McGinley, *Patients with certain kinds of cancers are nearly three times as likely to die of covid-19, study says*, Wash. Post (Apr. 28, 2020), <https://www.washingtonpost.com/health/2020/04/28/coronavirus-cancer-deathrates/>.

Showers are cleaned only on a weekly basis, if at all. Smelley Decl. ¶ 10. Phones and tablets, shared by all detainees on a given floor to communicate with loved ones or attorneys, are cleaned once a day, at most. Smelley Decl. ¶ 10; C. White Decl. ¶ 6; Kelly Decl. ¶ 31. On some units, detainees attempt to clean the phones and tablets themselves using generic cleaning liquids, but detainees on other units have no way of doing so. Russell Decl. ¶ 10; Carline Decl. ¶ 10. Towels, clothes, and bedding are not laundered frequently, either; detainees sometimes wait weeks to receive clean uniforms or blankets. Carline Decl. ¶ 12.

Plaintiffs are prevented from adequately cleaning any of these surfaces and spaces more frequently themselves because the Jail controls access to basic cleaning supplies, like mops and buckets, and provides them to detainees, at most, only once every morning. Carline Decl. ¶ 9; Kelly Decl. ¶ 30; Blanks Decl. ¶ 11. Detainees also do not have any bleach to clean these shared surfaces, even though the Jail staff has such chemicals available for this purpose. Russell Decl. ¶ 14. Deputies keep bleach in a secluded area that only deputies can access. *Id.* Deputies use Lysol, PineSol, and other name-brand cleaning supplies to clean their own areas, but the detainees are forced to use a different cleaner, called “Simple Green,” which does not protect against coronavirus. Ex. 10 (“Hubbard Decl.”) ¶ 6, 8; Pearson Decl. ¶ 15, 18, 19. Indeed, Simple Green’s own website states: “Simple Green All-Purpose

Cleaner is not a disinfectant and will not kill bacteria or viruses.”<sup>6</sup>

**C. Defendants do not provide basic personal hygiene supplies to detainees.**

In addition to the deplorable conditions they maintain inside the Jail, Defendants do not provide detainees with enough of the basic hygiene supplies that are critical to preventing the spread of COVID-19. Although the CDC advises that handwashing is one of the best ways to protect against COVID-19,<sup>7</sup> the Jail does not supply enough soap for detainees to regularly wash their hands. Defendants provide Plaintiffs and their fellow detainees with only two or three hotel-sized bars of soap per week, which Plaintiffs must use to wash their clothes, hands, and bodies. Carline Decl. ¶ 11; Smelley Decl. ¶ 11. Defendants do not provide additional soap when a detainee runs out; the detainee’s only option is to ask another detainee for soap or purchase it from commissary, if they have funds in their account. Carline Decl. ¶ 11; Smelley Decl. ¶ 11. Defendants do not otherwise provide Plaintiffs or putative class members with supplies for hand sanitization. Carline Decl. ¶ 11.

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<sup>6</sup> See Simple Green, *Coronavirus Frequently Asked Questions* (Mar. 11, 2020), <https://simplegreen.com/news-and-media/coronavirus-faq/>. The CDC has not identified Simple Green as one of the EPA-registered disinfectants effective against the virus in its Interim Guidance on Management of Coronavirus in Correctional and Detention Facilities. See Compl. Ex. 7 at 7, 9, 18.

<sup>7</sup> See Centers for Disease Control & Prevention, “When and How to Wash Your Hands,” <https://www.cdc.gov/handwashing/when-how-handwashing.html> (last visited Apr. 27, 2020).

**D. Jail staff do not consistently wear protective gear, putting detainees further at risk.**

Jail staff fail to consistently wear appropriate protective gear while inside the Jail—a stunning fact given that two deputies and two physicians working in the Jail have already died from COVID-19, and nearly 180 employees from the Wayne County Sheriff’s Office have already tested positive. C. White Decl. ¶ 9; Kelly Decl. ¶ 32; Carline Decl. ¶ 11; Pearson Decl. ¶ 13. Commander Donafay Collins, an employee of the Sheriff’s Office and one of the staff fatalities, was present on units with detainees right before he died of COVID-19.<sup>8</sup> Smelley Decl. ¶ 14. Even the deputies who have been diagnosed with COVID-19 still do not consistently wear masks or gloves. *Id.*

Compounding these egregious practices by the guards, Defendants have also denied detainees access to sufficient personal protective equipment. Though some detainees have been provided blue cloth masks, those masks are now weeks old. Mathews Decl. ¶ 11; C. White Decl. ¶ 9; Pearson Decl. ¶ 11; Ex. 11 (“Malec Decl.”) ¶ 7 (explaining that these masks are “like those you see at the dentist’s office.”). Other detainees were given paper masks that they were expected to wear for two weeks, even though the masks were so cheap that they tore once they were worn.

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<sup>8</sup> *Wayne County Sheriff’s Commander Donafay Collins dies of COVID-19*, WXYZ Detroit (Mar. 25, 2020), <https://www.wxyz.com/news/coronavirus/wayne-county-sheriffs-commander-donafay-collins-dies-of-covid-19>.

Ex. 12 (“H. White Decl.”) ¶ 4. Most of the detainees do not have gloves. Mathews Decl. ¶ 11; Hubbard Decl. ¶ 9.

**E. Defendants are failing to properly treat and quarantine detainees who test positive.**

Even though COVID-19 has already infiltrated the Jail, Defendants are not taking adequate measures to prevent the virus from spreading by quarantine and care for detainees who may be or are positive for COVID-19. Instead, Jail staff place these detainees in a makeshift and insufficient medical ward on another cell block without access to meaningful medical care. Examples of this careless practice are plentiful.

Detainee Mark Malec was housed in the same unit as Michael Meshinski, a former detainee who exhibited symptoms of COVID-19 in the facility and who died of the virus just two days after his release from the Jail in early April.<sup>9</sup> Mr. Malec became seriously sick shortly after Mr. Meshinski’s release. Malec Decl. ¶ 9. He had a headache and a cold, was coughing up black phlegm, and was unable to taste anything for two weeks. *Id.* Despite his known proximity to Mr. Meshinski, serious symptoms, and numerous requests for medical attention, Mr. Malec was not tested for COVID-19 until April 20, 2020—over two weeks after Mr. Meshinski’s death.

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<sup>9</sup> See Charlie Leduff, *Wayne County Jail Gave an Infected Inmate a Bus Pass Home. Now He’s Dead*, Deadline Detroit (Apr. 7, 2020), [https://www.deadlinedetroit.com/articles/24915/leduff\\_the\\_wayne\\_county\\_jail\\_gave\\_an\\_infected\\_inmate\\_a\\_bus\\_pass\\_home\\_now\\_he\\_s\\_dead](https://www.deadlinedetroit.com/articles/24915/leduff_the_wayne_county_jail_gave_an_infected_inmate_a_bus_pass_home_now_he_s_dead).

*Id.* ¶ 9. Mr. Malec tested positive for COVID-19, and he was placed into an 11-man make-shift infirmary after receiving his test results. *Id.* Mr. Malec explained that, in the unit:

[N]o one can come out of their cell, except for once a day. The Jail keeps bringing more sick people into the unit, so we keep getting exposed to the virus again, and I feel like I won't ever get healthy. We are not in any kind of pressurized rooms. The air just passes freely from one cell to the other. The deputies hand out meals, which we eat in our cells. Some of them wear gloves and masks and some of them don't. All of the detainees wear masks but not gloves, and we all share tablets, phones, and showers. They are cleaned with Simple Green after each use, but with disinfectant only once weekly.

*Id.* ¶ 9-10. Since being forced onto this “medical ward,” Mr. Malec has not seen a doctor, and the Jail has provided him only Tylenol, Gatorade, and cough syrup. Malec Decl. ¶ 11. Defendants’ conduct in this instance not only unreasonably endangered Mr. Malec’s health, but it also put other detainees in direct danger of exposure to the virus.

Davonte Velez began feeling ill on April 2, 2020. Ex. 13 (“Velez Decl.”) ¶ 3. For five days, he consistently asked for medical treatment, all while experiencing common symptoms of COVID-19, including coughing and shaking. *Id.* ¶ 4. After five days, the Jail staff finally took Mr. Velez’s temperature, which was 103 degrees Fahrenheit. *Id.* Mr. Velez, too, was taken to the Jail’s inadequate infirmary. Mr. Velez describes his horrifying experience while recovering from COVID-19:

Being locked in a room for 23 hours per day without being able to talk to anyone is causing me and some of the other guys to have

psychological problems. For 23 hours a day, I think about how I'm stuck in here with all of these sick people and I'm not getting better. When I try to ask the Jail staff about what's going on, they don't give me any answers.

*Id.* ¶ 12. The Jail did not even inform Mr. Velez that he had tested positive for COVID-19 until two weeks later. *Id.* ¶ 10. Mr. Velez is still sick and has been sick for almost a month—since April 2, 2020, he has tested positive for the virus twice. *Id.* ¶¶ 10-11.

**F. Defendants are failing to provide adequate and timely medical care.**

**1. Defendants' medical procedures are inadequate.**

In general, the process for obtaining medical attention—for COVID-19 symptoms or more routine medical care—is shockingly deficient. To request medical attention, detainees are required to fill out medical “kites”<sup>10</sup> but may do so only once in the morning or once at night. Carline Decl. ¶ 17. The Jail takes anywhere from weeks to months to respond to a detainee's kite, and sometimes, Jail staff never respond at all, or dismiss detainees' request for medical care. Carline Decl. ¶ 17; Smelley Decl. ¶ 3; C. White Decl. ¶ 12-13; Nickel Decl. ¶ 3; H. White Decl. ¶ 9.

Nurses distribute medication to detainees only twice a day, but they often bring detainees the wrong medication or fail to even bring any medication. Carline

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<sup>10</sup> A “kite” is a signed written request for medical attention that can be submitted once in the morning or once at night. Carline Decl. ¶ 17.

Decl. ¶ 18. Nurses use and re-use the same cups to hand out medication to multiple detainees without any regard for which detainees may be exhibiting symptoms of COVID-19. Carline Decl. ¶ 18. And nurses admonish detainees for seeking medical care, sometimes even withholding kites from detainees so they cannot put in the request. Pearson Decl. ¶ 14. Individuals showing symptoms of COVID-19 are frequently given little more than Tylenol and sent back to their units. Pearson Decl. ¶ 17; Malec Decl. ¶ 7.

## **2. Defendants punish detainees who raise concerns about the lack of medical care or unsanitary conditions of confinement**

Detainees who raise concerns about the lack of medical care or unsanitary conditions are punished. As a result, detainees are hesitant to even inform Jail staff that they may be feeling sick for fear that they will be disciplined. Smelley Decl. ¶ 4; Mathews Decl. ¶ 3.

Plaintiff Christopher Hubbard is diabetic and asthmatic, and he has had pneumonia at least four times. Hubbard Decl. ¶ 2. He is not receiving proper insulin or the right inhaler to treat his asthma, further exacerbating his already heightened risk for more serious complications from COVID-19—a risk that was even more concerning because Mr. Hubbard had been housed with Mr. Meshinski, the detainee who died from COVID-19 after his release. *Id.* ¶ 3. But after raising his concerns regarding his medical needs to an officer, Jail staff placed Mr. Hubbard in “the hole”—a solitary confinement wing of the Jail packed with detainees, many of

whom are showing signs of COVID-19—for seven days. *Id.* ¶ 10-12. “The hole” is musty and damp, like a basement, and crawling with mice and roaches. *Id.* ¶ 13. Mr. Hubbard could hear other detainees coughing and was forced to share an infrequently cleaned shower with these coughing detainees. *Id.* ¶ 12.

Like Mr. Hubbard, Mr. Velez has severe asthma and requires an albuterol inhaler. Velez Decl. ¶ 2. Even though Mr. Velez still remains sick one month after first showing symptoms, and even though he has tested positive for COVID-19 *twice*, the Jail still refuses to provide him an inhaler. *Id.* Marlon Blanks also has severe asthma, and despite a prescription for an inhaler, the Jail has refused to provide him one either. Blanks Decl. ¶ 2. One deputy told Mr. Blanks to “fuck off” when he asked for an inhaler, while a nurse told him he didn’t know what he was talking about. *Id.*

Similarly, after CalDerone Pearson discovered that his cell was filled with bugs and unsuccessfully sought supplies to clean it, he asked to be moved to a different cell. Pearson Decl. ¶ 19. The sergeant on duty told him he was “disobeying an order” and moved him to solitary confinement, where Mr. Pearson was locked in his cell for 23 hours a day, unable to access commissary or the phone, and denied hot water for a shower. *Id.* ¶ 20.

**G. Defendants are failing to test detainees who are symptomatic or who have been in close proximity to individuals who have tested positive.**

Although widespread testing of both symptomatic and asymptomatic

individuals is widely accepted as *essential* in combatting the spread of COVID-19,<sup>11</sup> Defendants fail to do so. Even though COVID-19 has already infected staff and detainees at the Jail and even killed two contracted Jail physicians, Defendants have tested only 90 of the 834 detainees.<sup>12</sup>

Concerningly, Defendants are failing to identify and test detainees that are obviously symptomatic or who have been in close proximity to those who are. For example, it took Defendants over two weeks to test Mr. Malec, who had shared a unit with Mr. Meshinski, the former detainee who is now deceased. Courtney White is a trustee who worked closely alongside Mr. Meshinski in the laundry room. C. White Decl. ¶ 10; Compl. ¶ 93. When Mr. White and Mr. Meshinski worked together, none of the detainees had masks, and even though Mr. Meshinski exhibited visible symptoms of COVID-19, Jail staff kept him in the laundry room. C. White Decl. ¶ 10. Mr. White was not tested for COVID-19 even after Mr. Meshinski's highly reported death—an obvious, proactive measure Defendants clearly should have taken. *Id.*

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<sup>11</sup> Umair Irfan, *The case for ending the Covid-19 pandemic with mass testing*, Vox (Apr. 13, 2020), <https://www.vox.com/2020/4/13/21215133/coronavirus-testing-covid-19-tests-screening>.

<sup>12</sup> Ross Jones, *Huge disparity among local jails testing for COVID-19*, WXYZ Detroit (Apr. 30, 2020), <https://www.wxyz.com/news/local-news/investigations/huge-disparity-among-local-jails-testing-for-covid-19>.

**H. Defendants fail to provide information about COVID-19 and its spread, instead misleading detainees to believe they are *safer* within the Jail.**

Although Defendants are clearly aware of the COVID-19 crisis, *see infra* Section III.A, they have done little to educate the detainees in their care about the pandemic; detainees are instead forced to rely on the news or information from loved ones—when they can access it—for details about the virus and how to best protect themselves. Mathews Decl. ¶ 10; Smelley Decl. ¶ 13; Nickel Decl. ¶ 4; Pearson Decl. ¶ 16. Some Jail staff have unplugged the television to restrict detainees’ access to news about COVID-19. H. White Decl. ¶ 12. Defendants have not even explained to detainees basic preventative measures such as proper hand washing. C. White Decl. ¶ 14. Female detainees who express concerns over COVID-19 are dismissed by Jail staff as “being dramatic.” Nickel Decl. ¶ 2. Other detainees report that the deputies treat them as “less than human” and dismiss their coronavirus-related concerns. Blanks Decl. ¶ 16.

Defendants have gone beyond failing to provide detainees with the information they need to stay safe during the pandemic and instead have engaged in active misinformation. On at least one occasion in Division I, Jail staff turned up the heat and told detainees that the heat would kill the virus.<sup>13</sup> Nickel Decl. ¶ 4.

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<sup>13</sup> Turning up the heat in the Jail will not kill the virus, at least not before it seriously harms the detainees and staff inside the Jail. A research team had to heat the virus up to 197 degrees Fahrenheit for 15 minutes to kill it. *See* Hannah Osborne,

Other Jail staff have improperly suggested that the Jail is the “best place possible” to be during the pandemic.<sup>14</sup> Nickel Decl. ¶ 4; C. White Decl. ¶ 14. Mr. Carline explains:

The Jail isn’t telling us anything about COVID. When I ask about COVID, they dismiss what we have to say. When detainees are scared or in fear of getting sick or dying, the deputies tell us we are in the best place possible. One deputy told us that he had been exposed to people with the virus but hadn’t caught it.

Carline Decl. ¶ 15.

**I. Defendants do not properly screen individuals entering the Jail, exacerbating the potential for viruses to infiltrate the Jail.**

Finally, Defendants do not effectively screen detainees entering the Jail or transferring between the various Divisions—a common-sense, proactive measure that would prevent the spread of COVID-19 from outside the Jail or from one Division to another. *See, e.g.*, Smelley Decl. ¶ 15; C. White Decl. ¶ 11.

For example, Dominick Kelly was transferred back into the Jail on March 31, 2020 from a program at the Detroit Reentry Center where individuals were sick.

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*Coronavirus can Survive High Temperatures for Long Periods, Study Finds*, Newsweek (Apr. 15, 2020), <https://www.newsweek.com/coronavirus-heat-kill-virus-1498074>.

<sup>14</sup> Dr. Homer Venters, former chief medical officer of the New York City jail system, cautions that persons held in jails are at a higher risk in the jail and are likely to face serious, even grave, harm due to the outbreak of COVID-19. *See* Dr. Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. Times, Mar. 16, 2020, <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>.

Kelly Decl. ¶ 1. Upon reentering the Jail, Mr. Kelly was placed in “quarantine,” which consisted of ten five-by-five cages lined up in a row in Division I and separated only by bars, not walls. *Id.* ¶ 3. Because of how easily air and objects passed between the cells in this area, it is impossible to suggest that individuals detained here were quarantined from other individuals.

Before placing him in this communal area, Jail staff never questioned Mr. Kelly about how he was feeling, never gave him gloves or a mask, and did not wear appropriate protective gear themselves. *Id.* ¶ 5-7. Mr. Kelly was forced to share a shower with five other detainees who were also in “quarantine,” but he never saw the shower being cleaned. *Id.* ¶ 10. The Jail staff gave him one hotel-sized bar of soap and refused his requests for more soap. *Id.* ¶ 11. After three days, Mr. Kelly was transferred to the mental health ward for a second phase of this “quarantine,” where he had a cellmate and shared a shower with thirty other detainees. *Id.* ¶ 17-18. He was transferred again to a different floor in Division I, then to Division II. *Id.* ¶ 24, 28. At no point was Mr. Kelly ever tested for COVID-19.

After the COVID-19 epidemic began, Plaintiff Shane Carline required unrelated medical attention in a local hospital. Carline Decl. ¶ 14. When Mr. Carline was transferred back into the Jail, he was sent to the mental health ward in Division I, where he was locked down for 24 hours a day. *Id.* He was then transferred back to general population in Division III without being tested or screened, even though

he had been in a hospital, where he likely encountered patients and hospital workers infected by COVID-19. *Id.*

## **ARGUMENT**

Plaintiffs and the class members they seek to represent are at imminent risk of death or serious injury. If this litigation is decided in the ordinary course, many class members will become seriously ill and die before final judgment. Numerous others will suffer severe pain or organ damage. Plaintiffs seek two forms of immediate relief.

First, on behalf of the class as a whole, Plaintiffs seek an order requiring Defendants to undertake and follow the basic preventative measures and procedures recommended by medical professionals for the management of COVID-19 in jails and correctional settings. These procedures ensure that those detained at the Jail: 1) have access to adequate and timely medical treatment to screen, test, and treat symptoms; 2) can practice social distancing; 3) can maintain necessary hygiene; and 4) are educated about COVID-19.

Second, medically vulnerable Plaintiffs, on behalf of a subclass composed of similarly vulnerable detainees, seek immediate release from the unsanitary, infectious jail environment because there are no measures that Defendants can take within the facility to protect these detainees from an unconstitutionally high risk of death or serious bodily harm. Their lives depend on how quickly they are released.

This relief is appropriate either through 28 U.S.C. § 2241 or, in the alternative, through 42 U.S.C. § 1983.

Plaintiffs easily meet the legal requirements for a temporary restraining order and preliminary injunction that would require Defendants to conform their practices at the Jail to medically accepted means of preventing and mitigating the spread of COVID-19 and to release members of the Medically Vulnerable Subclass. As explained below: (1) Plaintiffs are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm in the absence of relief; (3) the balance of equities weighs in their favor; and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). The court must balance each of the four factors and “no single factor is dispositive.” *City of Dearborn v. Comcast of Mich.*, 558 F. Supp. 2d 750, 754 (E.D. Mich. 2008). Where, as here, plaintiffs demonstrate “irreparable harm which decidedly outweighs any potential harm to the defendant,” the “degree of likelihood of success required” is less, and a plaintiff need only show “serious questions going to the merits.” *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

**I. Plaintiffs are likely to succeed on the merits because Defendants are violating Plaintiffs’ Eighth and Fourteenth Amendment rights.**

Plaintiffs and class members are highly likely to succeed on their claims because Defendants are deliberately disregarding the risk that Plaintiffs will contract

COVID-19 within the current conditions at the Jail, in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Defendants' failure to implement the basic steps recommended by health experts, the CDC, and Governor Gretchen Whitmer<sup>15</sup>—including access to basic medical screening and treatment protocols for infectious disease, providing soap and water so that those detained can wash their hands after touching objects or other people, giving people sufficient space to stay at least six feet away from others at all times, the ability to clean and disinfect all surfaces touched by multiple people at least once per day, and access to information about COVID-19—when they are well aware of the extreme risks posed by this virus constitutes deliberate indifference.

The government has a constitutional duty to protect those it detains from “a substantial risk of serious harm.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). This right arises under the Eighth Amendment post-conviction, *see id.*; *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), and under the Fourteenth Amendment’s Due Process Clause pre-conviction, *see City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Richko v. Wayne Cty., Mich.*, 819 F.3d 907, 915 (6th Cir. 2016).

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<sup>15</sup> *See* Compl. Ex. 12, Executive Order 2020-29 (Mar. 29, 2020); Compl. Ex. 7, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC.gov (March 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

To demonstrate a violation of the Eighth Amendment, convicted persons must show both an objectively substantial risk of serious harm and that prison officials subjectively “acted with deliberate indifference” towards the hazardous condition in question. *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000). Pursuant to the Supreme Court’s decision in *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2472–2473 (2015), pre-trial detainees need only satisfy the objective prong of the inquiry. *Hopper v. Phil Plummer*, 887 F.3d 744, 752 (6th Cir.), *reh’g denied* (May 1, 2018). Accordingly, the Pre-Trial Subclass can prove a Fourteenth Amendment claim by demonstrating solely that class members face a substantial risk of serious harm. *Kingsley*, 135 S. Ct. at 2472–73.

Both the Eighth and Fourteenth Amendment standards are satisfied here because Defendants violate Plaintiffs’ constitutional rights by incarcerating them in conditions that fail to adequately mitigate against the spread of a potentially fatal virus amid a growing pandemic and despite their knowledge and ability to do so.

**A. Plaintiffs are objectively at a substantial risk of harm.**

All people held in the Jail, whether detained pretrial or incarcerated post-conviction, are entitled to be protected from conditions of confinement that create a substantial risk of serious harm. *See Farmer*, 511 U.S. at 834 (correctional officer violated Eighth Amendment by failing to prevent “a substantial risk of serious harm”); *Estelle*, 429 U.S. at 104 (“deliberate indifference” to serious medical needs

violates the Eighth Amendment).

Corrections officials have a constitutional obligation to provide for detainees' reasonable safety and to address their serious medical needs. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (the state has an “unquestioned duty” to provide adequate medical care for detained persons); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *Estelle*, 429 U.S. at 104; *Brown v. Plata*, 563 U.S. 493, 531-32 (2011).

It is well established that, under the Fourteenth Amendment, pretrial detainees are entitled to at least the same level of protection as convicted detainees. *See Richko*, 819 F.3d at 915; *see also City of Revere*, 463 U.S. at 244 (“[T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner”); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding that the Fourteenth Amendment requires that pretrial detainees be protected from any form of “punishment”). Thus, pretrial detainees need show only that the conditions of their confinement are unreasonable. *Kingsley*, 135 S. Ct. at

2473-74 (pretrial detainees need not show that prison officials subjectively “acted with ‘deliberate indifference’” towards the hazardous condition in question).

Exposure to an infectious disease like COVID-19 without adequate preventive measures is objectively unreasonable under the Fourteenth Amendment and constitutes deliberate indifference to a serious risk to health and safety, in direct violation of the Eighth Amendment. A “condition of confinement that is sure or very likely to cause serious illness and needless suffering” to someone detained, which includes “exposure of inmates to a serious, communicable disease,” is precisely the type of serious harm that the Constitution protects against. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease . . . .”); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease.”); *Johnson v. Operation Get Down, Inc.*, No. 11-15487, 2014 WL 3752481, at \*5 (E.D. Mich. 2014) (finding that even a “short period” of exposures to an infectious antibiotic resistant staph infection could constitute deliberate indifference); *see also Farmer*, 511 U.S. at 833 (“[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.”); *Flanory v. Bonn*, 604 F.3d 249, 255-56 (6th Cir. 2010) (recognizing that a complete

denial of dental hygiene products can constitute deliberate indifference); *Lee v. Birkett*, No. 09–cv–10723, 2010 WL 1131485, at \*5 (E.D. Mich. Feb. 18, 2010) (holding that allegations that prisoners were forced to use common razors and be exposed to other unsanitary conditions for two months could constitute deliberate indifference).

COVID-19 is the quintessential “serious” and “communicable disease” from which the Constitution requires incarcerated people be protected. *Helling*, 509 U.S. 25 at 33-34. This disease has no vaccine, effective treatment, or cure. It can cause severe pain, and in even mild and moderate cases, it can feel like “having glass in your lungs” or “drowning in [one’s] own blood,” leaving patients choking and struggling to breathe. Compl. ¶ 34. And it can cause permanent lung damage. *Id.* ¶ 33. In critical cases, patients may need to spend weeks attached to a ventilator and blood oxygenation machine. *Id.* ¶ 35. Finally, COVID-19 has a fatality rate ten times higher than influenza. *Id.* ¶ 36.

Plaintiffs confined at the Jail are at an extreme, and unreasonable, risk of contracting COVID-19. Lauring Decl. ¶¶ 28-29 (the “Jail’s intake, screening, and quarantine procedure is wholly inadequate and staggeringly ineffective against preventing the risk of infection”). Across the country, governments have issued “shelter in place” orders closing public schools and non-essential businesses, banning people from eating in restaurants or even congregating in small groups, and

requiring individuals to stay in their homes unless it is absolutely necessary to leave. When people leave their homes, they are advised to stay at least six feet from others, wear masks, avoid touching their faces, and wash their hands immediately upon returning home. The message is clear and unprecedented: the risk of contracting COVID-19 is objectively unacceptable. This risk is thus also unacceptable for Plaintiffs who are detained, where the risk of contracting the virus is even higher. Lauring Decl. ¶ 41.

This risk is even more extreme and unreasonable for the Medically Vulnerable Subclass. The members of this subclass have conditions rendering them exceptionally vulnerable to death or serious harm if exposed to COVID-19. As a result, there is no practicable way to ensure that they can avoid infection and no practicable way to ensure that, if infected, they receive prompt and reasonable medical treatment within the Jail. Lauring Decl. ¶ 43. Serious illness is substantially likely, and older people and those with underlying medical conditions, such as lung disease, heart disease, or diabetes, are more likely to develop serious illnesses. Lauring Decl. ¶ 15. Therefore, their continued detention is a grave risk to their lives and violates the Constitution.

**B. Defendants have acted and are continuing to act with subjective indifference towards Plaintiffs' substantial risk of harm.**

This Court need not consider the subjective prong of the deliberate indifference standard with respect to members of the Pre-Trial Subclass. Yet even under the

Eighth Amendment’s more exacting standard, immediate injunctive relief is clearly appropriate for all Plaintiff classes. That is because Defendants have certainly known of and disregarded an excessive risk to detainee health or safety. *Wilson*, 501 U.S. at 303; *Richmond v. Hug*, 885 F.3d 928, 937 (6th Cir. 2018).

With respect to an impending infectious disease like COVID-19, deliberate indifference is satisfied when corrections officials “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33 (holding that a prisoner “states a cause of action . . . by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health”); *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (court “may infer the existence of [deliberate indifference] from the fact that the risk of harm is obvious” (citing *Farmer*, 511 U.S. at 842)).

This Court need not “await a tragic event” to find that Defendants are maintaining unconstitutional conditions of confinement amid a global pandemic. *See Helling*, 509 U.S. at 33. So long as the risk of serious harm is “likely,” as it is here, the Eighth Amendment is violated, even if “the complaining inmate shows no serious current symptoms,” it is “not alleged that the likely harm would occur immediately,” and “the possible infection might not affect all of those exposed.” *Id.*

Here, amid this global pandemic, it cannot be seriously disputed that any government officials, including Defendants, are subjectively aware of the risks posed by the coronavirus.<sup>16</sup> Through government orders,<sup>17</sup> CDC guidance aimed at jails,<sup>18</sup> and nationwide publications,<sup>19</sup> Defendants have been made well aware of the risks to incarcerated people. The Sheriff's own communications and announcements

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<sup>16</sup> This is particularly true for Defendant Sheriff Benny Napoleon, who lost an employee, Donanfay Collins, to COVID-19 and whose brother, Hilton Napoleon, was hospitalized for several weeks due to this virus. *See, e.g., We will remember: Tribute to a few of the metro Detroiters who died of coronavirus*, Detroit Free Press (May 2, 2020), <https://www.freep.com/in-depth/news/local/michigan/detroit/2020/04/12/coronavirus-covid-19-metro-detroit-tributes/2966714001/> (“‘It was like someone put an anvil around my neck and just dropped it,’ Napoleon said, when learning of [Collins’s] passing. ‘And I’ve been feeling very heavy since all of this transpired because I know this is not the last of it.’”); Marlowe Alter, *Highland Park Police Chief Hilton Napoleon hospitalized for 2 weeks with coronavirus*, Detroit Free Press (Mar. 26, 2020), <https://www.freep.com/story/news/local/michigan/wayne/2020/03/26/hilton-napoleon-coronavirus-michigan/2916825001/> (noting that Defendant Napoleon has been practicing social distancing from his family members due to the virus and believes in the importance of these practices).

<sup>17</sup> *See* Michigan Executive Order 2020-42, Michigan.gov (Apr. 9, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90640-525173--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-525173--,00.html).

<sup>18</sup> Compl. Ex. 7.

<sup>19</sup> *See* David Mills & Emily Galvin-Almanza, *As many as 100,000 incarcerated people in our prisons will die from the coronavirus, unless the US acts now*, Bus. Insider (Apr. 2, 2020), <https://www.businessinsider.com/failure-to-release-prisoners-is-condemning-thousands-to-death-2020-4>; Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. Times (Mar. 31, 2020), <https://nyti.ms/3aIBHjv>; Timothy Williams et al., *‘Jails Are Petri Dishes’: Inmates Freed as the Virus Spreads Behind Bars*, N.Y. Times (Mar. 30, 2020), <https://nyti.ms/2Jmnf4z>.

emphasize this awareness.<sup>20</sup> Similarly, the widespread public discussion regarding the heightened risk to medically vulnerable people make clear that Defendants are aware of the mortal peril that Jail conditions pose to such individuals. *See, e.g.*, H. White Decl. ¶ 12 (“I see Coronavirus on TV . . . When the guards hear something bad coming from the TV, they unplug it.”).

In addition, the overwhelming medical and scientific consensus is that social distancing of at least six feet is required to reasonably reduce the risk of transmission of the novel coronavirus. The CDC,<sup>21</sup> the American Medical Association,<sup>22</sup> the American Red Cross,<sup>23</sup> and the Michigan Department of Health and Human Services<sup>24</sup> have all concluded that social distancing is essential to preventing

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<sup>20</sup> *WCSO COVID-19 [sic] Response*, Wayne County Sherriff Connect (Apr. 11, 2020), <http://www.sheriffconnect.com/home/item/280-wcso-covoid-19-response.html>.

<sup>21</sup> *Social Distancing, Quarantine, and Isolation*, CDC.gov (Apr. 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>; *How to Protect Yourself & Others*, CDC.gov (Apr. 13, 2020) (explaining the paramount importance of social distancing, even if one is already taking other precautions such as a mask).

<sup>22</sup> *AMA, AHA, ANA: #StayHome to confront COVID-19*, Am. Medical Ass’n (Mar. 24, 2020), <https://www.ama-assn.org/press-center/press-releases/ama-aha-ana-stayhome-confront-covid-19>.

<sup>23</sup> *Coronavirus – What Social Distancing Means*, Am. Red Cross (Apr. 14, 2020), <https://www.redcross.org/about-us/news-and-events/news/2020/coronavirus-what-social-distancing-means.html>.

<sup>24</sup> *MDHHS issues Emergency Order requiring compliance with Executive Orders under penalty of civil fines up to \$1,000 and referral to licensing agencies for*

transmission of the deadly infection. The CDC itself describes social distancing as “a cornerstone of reducing transmission of respiratory diseases such as COVID-19,” as “[t]he best way to prevent illness,” and as “extra important” for vulnerable individuals.<sup>25</sup> Defendant Napoleon concedes this point: “If you really love [your family and the people around you], you will adhere to the governor’s directive” to stay and home and practice social distancing.<sup>26</sup>

In the face of this awareness, Defendants’ ongoing confinement of Plaintiffs is deliberately indifferent to the risks caused by this virus and must be remedied. “Failing to take reasonable measures to abate [risk]” demonstrates disregard of such risk. *Farmer*, 511 U.S. at 847. Defendants demonstrate their disregard of the grave risk posed by COVID-19 by failing to implement essential steps urged by health experts, including the CDC, to stop the spread of the virus.

Here, the list of reasonable measures to prevent the spread of COVID-19 is well delineated and publicized: “[s]ocial distancing and proper hygiene are the only

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*enforcement*, Mich. Dep’t of Health & Human Servs. (Apr. 2, 2020), <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-524105--,00.html>.

<sup>25</sup> *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC.gov (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

<sup>26</sup> Marlowe Alter, *Highland Park Police Chief Hilton Napoleon hospitalized for 2 weeks with coronavirus*, Detroit Free Press (Mar. 26 2020), <https://www.freep.com/story/news/local/michigan/wayne/2020/03/26/hilton-napoleon-coronavirus-michigan/2916825001/>.

effective means by which we can stop the spread of COVID-19.” *Thakker v. Doll*, \_\_\_ F. Supp. 3d \_\_\_, 2020 WL 1671563 at \*8 (M.D. Pa. Mar. 31, 2020). As noted above, the CDC has, pushed detention facilities to implement social distancing and “[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing,” and advising that facilities must, “[s]everal times a day, clean and disinfect surfaces and objects that are frequently touched, especially in common areas.” Compl. ¶ 43.

Despite these clear directives, Defendants have not provided Plaintiffs with protective measures—the space, antibacterial soap, sanitizer, and cleaning supplies—necessary to allow staff and detainees to remain safe. Nor have Defendants provided timely and adequate medical care to identify, medically isolate (not punitively detain), and treat infected people. As a result, the entire class has a substantial risk of contracting COVID-19, and the Medically Vulnerable Subclass faces a very realistic threat of death and/or permanent organ damage. Luring Decl. ¶¶ 38, 43. Defendants’ failure to act puts them out of step with many other jails and prisons around the country who are implementing this life-saving medical guidance.<sup>27</sup>

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<sup>27</sup> Justin Carissimo, *1,700 inmates released from Los Angeles County in response to coronavirus outbreak*, CBS News (Mar. 24, 2020), <https://www.cbsnews.com/news/inmates-released-los-angeles-county-coronavirus-response-2020-03-24/>.

Although courts give some latitude to jail and prison officials to decide what actions are “reasonable” to deal with safety within facilities, COVID-19 is a threat to detainees’ health and safety of a magnitude unseen in recent history. At this moment, there is only one way to minimize the risk of COVID-19: prevent its spread by social distancing.<sup>28</sup> By failing to take the necessary steps to do so in the Jail, Defendants are knowingly exposing Plaintiffs, guards and staff, and the public at large to the serious risk of a painful and lethal disease. That risk is unacceptable and unconstitutional.

Officials’ indifference to the significant risk of permanent damage and death to the Medically Vulnerable Subclass is even more unacceptable. It is well-documented that these individuals face a risk of death or permanent organ damage far in excess of the rest of the population. Stern Decl. ¶ 11; Lauring Decl. ¶¶ 38, 43. This risk is evident in the COVID-19 death toll to date—for instance, in New York state, almost 90% of reported COVID-19 deaths involved at least one comorbidity, according to the state’s department of health.<sup>29</sup> Defendants’ refusal or inability to provide circumstances that would limit the subclass’s exposure to the virus

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<sup>28</sup> Compl. ¶ 8; Lauring Decl. ¶ 13; Dr. Francis Collins, *To Beat COVID-19, Social Distancing is a Must*, NIH Director’s Blog (March 19, 2020), <https://directorsblog.nih.gov/2020/03/19/to-beat-covid-19-social-distancing-is-a-must/>.

<sup>29</sup> *NYSDOH COVID-19 Tracker*, N.Y. State Dep’t of Health, <https://covid19tracker.health.ny.gov/> (last visited May 4, 2020).

constitutes deliberate indifference. At this point, only release will sufficiently protect the medically vulnerable from their very real risk of death. *Malam v. Adducci*, \_\_ F. Supp. 3d \_\_, 2020 WL 1672662, at \*2, 9 (E.D. Mich. Apr. 6, 2020) (granting petitioner’s application for a temporary restraining order requiring her immediate release and stating that “[p]etitioner’s confinement at the Calhoun County Correctional Facility renders her substantially likely to contract COVID-19, and Petitioner’s severe health conditions render her substantially likely to suffer irreparable harm or death as a result”). Plaintiffs have shown that they are likely to succeed on the merits of their claims.

## **II. Plaintiffs will suffer irreparable harm.**

Plaintiffs allege injuries that are irreparable and, therefore, are not suitable for resolution in the ordinary course of litigation. There is no injury that is more irreparable than death, and Plaintiffs face a heightened risk of contracting a deadly virus due to Defendants’ actions. Nor can these injuries be redressed through monetary damages. This risk is not speculative: in one Louisiana prison where COVID-19 has been allowed to spread, five people have died in less than a week.<sup>30</sup>

According to Dr. Lauring, a virologist, specialist in infectious diseases, and

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<sup>30</sup> *ACLU Sues Louisiana Prison After 5 COVID-19 Deaths Reported*, Democracy Now (Apr. 7, 2020), [https://www.democracynow.org/2020/4/7/headlines/aclu\\_sues\\_louisiana\\_prison\\_after\\_5\\_covid\\_19\\_deaths\\_reported](https://www.democracynow.org/2020/4/7/headlines/aclu_sues_louisiana_prison_after_5_covid_19_deaths_reported).

an Associate Professor at the University of Michigan, absent immediate intervention from this Court, people will die because of Defendants' deliberate indifference:

[I]t is my professional judgment that individuals placed in any division of the Jail are at a significantly higher risk of infection with COVID-19 as compared to the population in the community, given the housing conditions in the facility, and that they are at a significantly higher risk of harm if they do become infected. These harms include serious illness (pneumonia and sepsis) and even death.

Without a vaccine, reducing the Jail's population to the point where social distancing can always be achieved is the only way to protect the health and safety of people detained in the facility and the public at large.

For the medically vulnerable . . . immediate release is the only option. The detainees' inability to practice physical distancing at all times, coupled with the Jail's failure to properly screen, identify, and quarantine infection, and their widespread neglect of medical needs creates a meaningfully higher risk of death for these individuals.

Lauring Decl. ¶¶41-43.

Moreover, Plaintiffs seek relief from violations of their constitutional rights. “[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.” *ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). An injunction is appropriate to prevent a substantial risk of deprivation of constitutional rights, as well as death or permanent, debilitating injury. Being compelled to endure a substantially increased risk of serious illness and death will always constitute irreparable injury. *See, e.g.*,

*Helling*, 509 U.S. at 33 (“It would be odd to deny an injunction to detainees who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”).

The risk of permanent harm to Plaintiffs applies with greater force to the Medically Vulnerable Subclass, for whom continued detention is even more likely to cause injury and death. *See Wilson v. Gordon*, 822 F.3d 934, 958 (6th Cir. 2016) (upholding preliminary injunction “where the alleged irreparable harm involves delay in or inability to obtain medical services”). With 13 confirmed COVID-19 cases in the Jail, the risk of death and physical devastation to subclass members is an absolute certainty that cannot be ignored.

Courts across the country have recognized that risk of exposure to COVID-19 constitutes an irreparable harm; in turn, they have granted immediate release to people exposed to COVID-19 and have otherwise required jails and prisons to take immediate measures to reduce the risk of exposure.<sup>31</sup> This groundswell reflects an

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<sup>31</sup> *See* Ex. 14 (providing decisions from seven district courts); *see also Zhang v. Barr*, No. ED CV 20-00331-AB, 2020 WL 1502607, at \*6 (C.D. Cal. Mar. 27, 2020) (granting an immediate bond hearing in light of the “global pandemic by which delay in determining Petitioner’s release exposes him to unnecessary risk”); *United States v. Garlock*, No. 18-Cr-00418, 2020 WL 1439980, at \*1 (N.D. Cal. Mar. 25, 2020) (ordering, *sua sponte*, extension of convicted defendant’s surrender date and noting “[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided”); *Castillo v. Barr*, \_\_ F. Supp. 3d \_\_, CV 20-00605 TJH (AFMx), 2020 WL 1502864, at \*5 (C.D. Cal. Mar. 27, 2020) (noting “the risk of infection in immigration detention facilities – and jails – is particularly high”). This Court

emerging judicial consensus that people cannot be safely detained when they are exposed to a serious risk of contracting COVID-19.

COVID-19 is already in the Jail. Every possible step must be taken to ameliorate the risk to those detained. Plaintiffs have shown irreparable harm.

**III. The public interest and balance of equities weigh heavily in Plaintiffs' favor.**

The substantial risk to Plaintiffs of contracting a deadly disease considerably outweighs any potential harm to Defendants. As discussed above, Plaintiffs will suffer significant harm if forced to endure the current conditions in the Jail.

The only potential harm Defendants face if ordered to bring their Jail into compliance with CDC guidelines is economic: Jail staff may have to expend additional time, and the County may have to expend additional money, to provide the social distance, information, hygiene products, cleaning agents, and medical treatment necessary to kill and/or treat the virus. But the possibility that Defendants will have to spend money to reduce the substantial risk that Plaintiffs will be exposed to a deadly disease does not tip the balance in their favor because “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079

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recently issued a temporary restraining order addressing similar issues in the Oakland County jail. *See Cameron v. Bouchard*, No. 20-cv-10949, 2020 WL 1929876 (E.D. Mich. Apr. 17, 2020).

(6th Cir. 1994); *see also Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (protection of constitutional rights is “always in the public interest”).

Immediately implementing the requested hygiene, social distancing, screening, and testing measures for the whole Class is the only way to reduce the imminent and grave risk of serious illness or death. These measures will also promote Defendants’ interests in ensuring the safety of the staff at the Jail and the community at large. Accordingly, the public interest would be served by issuing a preliminary injunction that requires Defendants to implement constitutionally adequate measures to prevent the spread of COVID-19 in the Jail.

The balance of equities and the public interest also favor release of the Medically Vulnerable Subclass members who, as a practical matter, cannot be constitutionally held in the Jail at this time. Release of these individuals will save the Jail money and reduce the demands on Jail staff, including guards and nurses. Further, releasing medically vulnerable individuals is the only way to eliminate the unacceptable risk to their health and the concomitant demand on public health resources that will result when they become infected in jail.

A worsened outbreak at the Jail has the potential to create a “tinderbox” scenario that drains the Detroit metropolitan area of limited medical resources,

including intensive care unit beds and ventilators.<sup>32</sup> In Michigan, the COVID-19 outbreak has already resulted in unprecedented public health demands that have strained the local health care system.<sup>33</sup>

COVID-19 is, at this very moment, devastating Michigan's carceral system. In one Michigan prison alone, 10% of all incarcerated people have tested positive for COVID-19, and 9 prisoners have already died statewide.<sup>34</sup> Releasing vulnerable individuals is the only way to save lives and reduce the burden on the community and health infrastructure, and it is clearly in the public interest.

### CONCLUSION

For these reasons, Plaintiffs ask this Court to issue a temporary restraining order and preliminary injunction ordering the relief requested in their motion.

Respectfully submitted,

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Thomas B. Harvey (MBE #61734MO)

/s/Martin L. Saad

Martin L. Saad (DC Bar No. 462096)\*  
Sheena R. Thomas (DC Bar No.  
1020290)\*

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<sup>32</sup> *New Model Shows COVID-19 Death Toll is 100,000 Higher Than Current Projections*, ACLU.org (Apr. 22, 2020), <https://www.aclu.org/press-releases/new-model-shows-covid-19-death-toll-100000-higher-current-projections>.

<sup>33</sup> See Paul P. Murphy, *Detroit hospital workers say people are dying in the ER hallways before help can arrive*, CNN (April 9, 2020), <https://www.cnn.com/2020/04/09/us/detroit-hospital-workers-sinai-grace-coronavirus/index.html>.

<sup>34</sup> See Compl. ¶ 49 (and source cited therein).

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\*Applications for admission forthcoming

DATED: May 4, 2020

**CERTIFICATE OF SERVICE**

I affirm that this Emergency Motion for Temporary Restraining Order and Preliminary Injunction and supporting brief and exhibits will be served concurrently with, and in all the same manners as, the service of the Summons and Complaint in this matter.

*/s/Allison L. Kriger* \_\_\_\_\_

Allison L. Kriger

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CHARLES RUSSELL, *et al.*,  
individually and on behalf of all  
others similarly situated,

Plaintiffs,

v.

WAYNE COUNTY, MICHIGAN;  
BENNY NAPOLEON, in his official  
capacity as the Sheriff of Wayne  
County, *et al.*,

Defendants.

Case No.

Class Action

**Index of Exhibits To Brief in Support of Plaintiffs' Emergency Motion For  
Temporary  
Restraining Order And Preliminary Injunction**

**EXHIBIT**

**DESCRIPTION**

1	Declaration of Courtney White
2	Declaration of Mark Matthews
3	Declaration of Terri Nickel
4	Declaration of Dominick Kelly
5	Declaration of Shane Carline

6	Declaration of Carl Smelley
7	Declaration Marlon Blanks
8	Declaration of CalDerone Pearson
9	Declaration of Charles Russell
10	Declaration of Christopher Hubbard
11	Declaration of Mark Malec
12	Declaration of Harry White
13	Declaration of Davonte Velez
14	District court decisions

DECLARATION OF COURTNEY WHITE

*I, Courtney White, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746:*

1. My name is Courtney White. I am 54 years old. I have high blood pressure and high cholesterol.
2. I have been in custody at the Wayne County Jail – Division III (“Dickerson”) since December of 2019. I was housed in Ward 509 on C-1, but on April 22, 2020 I was moved to E-3
3. When I was in 509, I slept in an 8 or 9 by 15 foot cubicle with three other men. There is one bunk on each wall. It is impossible to maintain a distance of six feet from another person inside of the cubicle. It has 31 bunks upstairs and 31 downstairs. There were probably about 40 guys total in the unit. There are eight showers, eight bathrooms, and eight tables for everyone to share. During meals, 4-5 men sit at each table. It is impossible to maintain a distance of six feet from another person. The tables are not even six feet away from each other. And, when we are watching tv, everyone is seated close together.
4. E-3, where I am now, is set up in a similar way. There are two floors. There are 30 rooms downstairs and 30 rooms upstairs. There are approximately 45 guys here, and we each have our own room. The rooms have doors and windows, but they are not air sealed. Vents push air in and out. They have been blowing cold air, and it has very cold.
5. The first floor has a common area with tables. There are six tables for all 45 guys. When we’re eating at the tables it is impossible to be six feet apart from another person. Some of the deputies have been letting us space out when we eat, but others don’t, and it is not possible to wear masks while we’re eating.
6. There are four sinks, four toilets, and eight showers for all of us to share. We do not have access to disinfectant of any kind, and no one cleans with disinfectant. We used to have access to disinfectant spray, but the jail took it away. Now we only have simple green, which is not a disinfectant, and we do not have any paper towel. We have to use c-fold napkins or rags from the laundry to wipe down common surfaces. The tables are sprayed down with Simple Green after every meal, but the phones, tablets, bathrooms and everything else is cleaned with Simple Green once daily at the most.
7. Lately, we have been getting as much soap as we want. They are little hotel-size bars that run out quickly. They dry our skin out really badly.
8. The inmates get one clean uniform and clean linens once weekly.
9. On or around April 11, the jail provided all of the inmates with masks, but we don’t wear them when we sleep or when we eat. The jail staff inconsistently wears masks. Some wear them and some don’t.
10. I am a trustee, and I work in the laundry room. I’m responsible for laundry for all three divisions plus juvenile. I worked in the laundry room with a man named Michael Meshinski. He was released from the jail at the beginning of April, and then died of COVID a couple of days later. Mr. Meshinski and I were not housed in the same unit. We only worked today. At the time we worked together, none of the inmates had masks, and he looked sick to me. He was coughing and blowing his nose. I would have to tell him to wash his hands after he coughed or sneezed.

11. To this day, I have never been tested for COVID-19. I am really scared because there are several guys in my unit who are on work release. They leave the jail for several hours a day, and then they come back to the jail and sleep here at night. I don't know where they've been or who they've been around. Every time they leave and come back, it puts us at risk.
12. There are a bunch of guys in here who are sick. We have been trying to get tested, but no one has gotten tested. It takes 3-4 days to a week to get a response when you ask for medical attention. Lately, if any of the inmates tell the jail staff they feel sick, all the jail does is give us Tylenol and, sometimes, they check our temperature.
13. Recently, I requested medical care because my left arm was numb. I still haven't seen a doctor. The only thing the jail did was give me tylenol. They have since taken me off of the Tylenol, and my arm is still numb.
14. The jail hasn't told us anything about coronavirus except that we should stay 6-10 ft apart. They know we can't really do that, though. They also put up a bunch of posters that instruct us to cover our mouths. It seemed like they did it because people were coming in for a tour.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Courtney White on April 24, 2020.

By: /s/ Allison L. Kriger  
Allison Kriger

Date: April 24, 2020

## DECLARATION OF MARK MATHEWS

*I, Mark Mathews, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746:*

1. My name is Mark Mathews. I am 61 years old, and I have been at Division III ('Dickerson') of the Wayne County Jail since March 6, 2020.
2. I was brought to the Wayne County Jail from the Oakland County Jail, where I had been locked up since February 20, 2020. When I arrived at the Wayne County Jail I was taken to the medical unit because I was sick, and I recently had surgery on my pancreas. The medical staff took an xray of my lungs, and they took my temperature, but I was not tested for COVID-19. The medical personnel told me I had something on my lungs that looked like double pneumonia, and I was given antibiotics.
3. After I was given the antibiotics, I was put in general population on C-1, 117. Ever since I have been placed here, I have been really scared. I feel like I am going to die if I get COVID-19 because, in addition to having pancreas surgery and being diagnosed with pneumonia, I have hypertension and diabetes. The jail put me on a unit with 40 men, and it is almost impossible to be six feet away from anyone at any given time. A lot of the guys in my unit have been sick, but they're afraid to say something because they know they'll get locked in a room by themselves.
4. There are also several men in my unit who are on work release. That means that they go to work outside of the jail, and then they come back here in the evening. I don't know where they have been or who they have been around, and the jail hasn't tested them for COVID-19. As far as I know, none of the inmates in my unit have been tested. New guys are coming in all the time, and they don't get tested either. They get quarantined for 7 days, and they get their temp taken. That's it.
5. I have also complained to the medical unit that my chest was hurting. If an inmate's chest is hurting, he is sent to medical right away. When I went to medical, they kept telling me they couldn't really do anything, and that I had to see a doctor. No doctor was available.
6. We sleep in four-person cubicles. There is one bed on each wall, and they are approximately 2 ½ - 3 ft away from each other. It is impossible to maintain a distance of six feet from another person when we are in our cubicles, and we do not sleep with masks on.
7. All 40 guys share eight sinks, eight toilets, and eight showers. They are cleaned twice daily, regardless of how often they are used. The inmates can clean those areas whenever

we want to with Simple Green, but Simple Green is not a disinfectant. those spaces ourselves because we do not have access to disinfectant spray. We only have Simple Green, which is not a disinfectant, and we have to reuse rags or old towels to wipe stuff down.

8. During meals, all 40 men share a few tables. It is impossible to be six feet away from anyone during meals, and none of the guys wear masks when they're eating. The meals are served on trays by inmate trustees. They wear gloves and masks, but they touch a bunch of stuff before they touch our trays. We also use the tables to play games and hang out. The tables are wiped down after each meal, but not more than that.
9. We get new uniforms and towels once per week. We get as much soap as we want, but it's really drying. We use the same soap to wash our hands, our bodies, and our clothes, and we have to use our towels or uniforms to dry our hands. We don't have access to any hand-sanitizer.
10. The jail hasn't told us anything about corona virus. Everything we know is from the news.
11. We got masks for the first time a couple of weeks ago. They are blue cloth. We haven't received new masks since then. None of the inmates have gloves. The jail staff does not wear gloves, but some of them wear masks. They just started a week or so ago.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Mark Mathews on April 20, 2020.

By: /s/ Allison L. Kriger  
Allison Kriger

Date: April 20, 2020

## DECLARATION OF TERI NICKEL

*I, Teri Nickel, certify under penalty of perjury that the following statement is true and correct:*

1. My name is Teri Nickel. I am 36 years old. I was incarcerated at Wayne County Jail-Division One (also known as the “New Jail”) from February of 2020 to March 30, 2020.
2. While I was in custody, I was in fear for my life due to Covid-19 because I have asthma, a thyroid condition, recovering liver failure, and a damaged heart valve. Inmates were being transferred from one unit to another regularly, and no one was tested or otherwise evaluated for Covid-19 at any time. The general narrative from deputies was “you’re safer in here than you are out here,” in response to any girls who complained about feeling symptomatic. I never saw or heard of anyone who received medical attention in response to these complaints. Instead, they were told they were “being dramatic.” And, no one was ever quarantined from what I saw.
3. If an inmate feels sick, she has to fill out a medical kite. It takes anywhere from one week to 60 days to get a response.
4. I never received any information about Covid-19 from the jail staff until the last ten days that I was locked up. The jail turned the heat up really high one day, and one of the deputies told us that heat kills the virus. That was the only time jail staff told us about Covid directly. Otherwise, the only reason I knew about Covid-19 was from the news and telephone calls with family and friends and my attorney. The jail never gave us any guidelines or information, verbally or in writing, about how to stay safe, how the virus is spread, or what symptoms we should look for.
5. During the month of March, I was transferred from one unit to another a total of five times. I was never tested or evaluated for Covid-19. None of the inmates were tested or evaluated. The standard units are shared by either 10 woman or 20 women. There are two women to every cell, and each cell has bunk beds. The top bunk is only a couple of feet higher than the bottom bunk. So, it’s impossible to stay six feet away when we are sleeping. About one foot away from the bottom bunk is a toilet without a lid that is one foot from the beds. Then, there is a make-shift desk right by the beds. The person in the top bunk has to step on that to get up to the bed. There isn’t a ladder. I don’t know exactly how big the cells are, but there isn’t enough room to be six feet away from your cellmate.  
phone
6. Our cell doors are usually open all day. That was still true even in the last couple of weeks. Immediately outside of the cells is a common area that has metal picnic tables, a TV, tablets, and a phone, and there are showers nearby off to the side. I don’t know how big

the common area is, but there definitely isn't enough room for everyone to be six feet apart. The unit with 10 women has three tables, and the 20-women unit has five tables. Everyone eats at those tables, and everyone uses the same tablets and telephone. I have only seen one deputy clean off the tablets and phone after each use, but otherwise, they are not cleaned.

7. The ventilation is very bad. There is usually a body odor or moldy water smell. The day that the jail turned the heat up really high and people were really uncomfortable, the deputies told us that the ventilation is really bad.
8. I never received any gloves or a mask, and neither did any of the other inmates, except the trustees when they were spraying disinfectant or serving food.
9. I have never seen how our food is prepared, nor have I ever assisted with food preparation. For breakfast, the trustees bring us carry-out containers at 5-6 am. They slip it under the bars. Then, at 10:30 am the trustees bring us food. They use gloves but no hair nets or masks. They give us plastic spoons that are all unpackaged in a flimsy plastic bag. We're told, "take one and pass it down." So, each girl grabs the bag, then reaches into the bag to pull out a single spoon. None of the girls wear gloves when they touch the bag or take a spoon. The process for the other meals we get during the day, is the same.
10. We also didn't have any hand sanitizer. Although we could essentially get as much soap as we wanted, it was hard to wash our hands because most of the sinks were unusable. The sink water is tied to your toilet water and also the toilet and sink of the cell next to you. If you don't flush your toilet for long enough, the excrete will flow to your neighboring cell's toilet. It made everyone not want to use the sink water. People didn't really wash their hands for that reason. And, many of the sinks aren't completely in working condition – e.g. the hot or cold water won't work, or they'll be too dirty to use. Sometimes they have maggots, fruit flies, or other bugs. I shared my sink with my cellmate as well as inmates whose sinks didn't work.
11. Generally, we were allowed to shower as much as we wanted, but all of us share only a few showers, and the area is not large enough to be six feet away from anyone else. The showers are filthy. They are sprayed down every other day, but if the inmates want them wiped down, we have to do it ourselves.
12. Each inmate got one roll of toilet paper twice per week. If there was a toilet paper shortage, they would not restock unless it was toilet paper day. And, we never got any paper towels. Once or twice a week, the deputies would slide a pile of c-fold napkins through a window into the common area. There was no established way to distribute them. Inmates could take as many as they wanted from the pile, so sometimes there weren't enough for everyone.

13. We don't have disinfectant to clean the tables or any other surfaces, such as the toilets, sinks, or showers. Every few days, the trustee would spray all of the surfaces with a bleach cleaner. They sprayed every other day during the last ten days that I was at the jail. The trustees did not wipe the surfaces after they sprayed. And, most of the time they missed surfaces, and I would have to instruct them to spray a surface that they missed like a toilet, sink, or shower. After the trustees sprayed, we used toilet paper or c-fold napkins, when we had them, to wipe the surfaces clean. Because the trustees only sprayed every few days or every other day, we could not disinfect any surfaces after each use.
14. Aside from the bar soap, we have to purchase hygiene products. On average, I spent about \$10-\$20 on hygiene products and clothes.
15. The staff started wearing gloves and masks around March 20.
16. The jail is not taking this situation seriously, and people are going to get very sick and possibly die. The inmates are feeling desperate inside. We are literally helpless inside.

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TERI NICKEL

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DATE

DECLARATION OF DOMINICK KELLY

*I, Dominick Kelly, certify under penalty of perjury that the following statement is true and correct:*

1. My name is Dominick Kelly. I am 21 years old, and I am currently incarcerated in Ward 509 at the Wayne County Jail-Division II (also known as the “old jail”). I have been in the Wayne County Jail since March 31, 2020. I first got locked up in the jail on September 28 then I went to Ryan Correctional for a program, but the program was cut short because of coronavirus. There were a couple of people sick at Ryan.
2. I have asthma for which I am prescribed an Albuterol inhaler. I am also allergic to tomatoes, and the jail keeps giving me food with tomatoes.
3. When I arrived back at the Wayne County Jail on March 31, I was held in quarantine in the “new jail” for three days. The unit in which I was quarantined at the new jail had about 10 different 5x5 rooms all lined up next to each other. I was in a cell by myself, but they were not sealed. They were like cages.
4. The staff took my temperature when I got there, but I was not asked about my health otherwise. I wasn’t asked any questions about how you were feeling, or whether you felt sick.
5. During the three days I was there, the Jail staff didn’t mention anything about coronavirus.
6. During those three days, I was physically touched or at a distance of less than six feet from approximately six officers. Some wore gloves and others wore nothing. But no one wore masks. I also did not have gloves or a mask.
7. During meal service, the trustees came and served us food. They were wearing gloves but no masks. The food is served in a foam carryout type container. A jail guard opens the top and looks inside before they hand it to us. They never wore gloves or masks when they did that, and the box was about two feet from their face when they did that.
8. When we’re done eating, the trustees come around to collect the trays.
9. My cell in quarantine had a single bed, and a toilet that doesn’t have a lid. It’s one foot from the bed. The toilet itself was clean, but if the toilet next to me is flushed then the excrement flows into the toilet in my cell. The sink looked clean.
10. During those three days, five inmates, including myself, shared one shower. The shower is not cleaned after each use. I didn’t see it get cleaned one time in three days.
11. I was given a clean uniform in quarantine. I only got one bar of soap for three days. It’s a hotel bar size. We use that to wash our hands and to shower. I would run out after one shower. In order to conserve, I broke the bar in half. I asked multiple times for soap, but the jail wouldn’t give it to me. Apparently, they did not have anymore soap to give me.
12. I got one clean towel in quarantine. I did not receive a new roll of toilet paper. I used the one that was already in the cell that look like it had been partially used. We had no paper towel, no kleenex, no c-fold napkins.
13. In quarantine we have no access to cleaning products, and I never saw anyone clean the showers or phone or any of the other common areas like the tables or round bench stools.

14. During quarantine only one person is let out their cell at a time. We each have one hour. Nothing is cleaned between each person's hour outside of their cell.
15. After the three days of quarantine I was put in handcuffs and taken to the fourth floor of the new jail, the mental health ward. I was there for a couple of days. We can only have towels during part of the day. I was provided with a dirty mat and slept in a dirty cell. The mental health ward is filthy. The walls are covered in feces, pee, and vomit. You can smell the toilets. They're filthy. The sinks are filthy. The walls are filthy.
16. There is no hand sanitizer in mental health ward or in quarantine. We have access to soap in the mental health ward. I use the same towel to wipe off after I shower as I do to dry my hands. The only thing I have to dry my hands when I don't have a towel is my clothes.
17. There are 4 mental health rocks, with anywhere from 6 people to 13 people. You have a dirty mat and they give you two covers. There is one room where there is one bed. Otherwise, there are two beds and two people in each a cell. The beds are stacked bunkbeds. There is about 2 ½ -3 ft between beds.
18. The cells are open, but you go back in your room every 30 minutes. Each rock has one shower that all of the inmates share. I've never seen anyone clean the shower. They aren't cleaned unless the inmates clean them, but when I asked they wouldn't give me disinfectant. I didn't see anyone clean the phones off. This time when I asked for paper towel and spray they said they didn't have it. There are tables set up like in the quarantine rock but a little bit bigger. On the small rock there are three tables. The tables are not cleaned. Nothing ever gets cleaned on the mental health ward. Sometimes if you're lucky you get spray.
19. When I was on the mental health floor there were people coughing, throwing up, wheezing. Nobody was wearing masks or gloves. None of the inmates got masks anywhere in the jail that I saw until April 11. The mask is like a doctor's mask.
20. The mental health ward stinks. There is no air flow. My cell was right next door to a person who was sick. The cells have regular bars.
21. The inmates talked about coronavirus. One of the inmates said they had Covid, but I didn't know whether he was telling the truth.
22. Of the two days I was in the mental health ward, I saw more than five staff. Some were wearing protective wear. Others were not.
23. In the mental health ward, the trustees serve food. They serve it in the same way as they do in the quarantine rock. They had gloves but no masks. They slide the food under the bars.
24. Then I was moved to a rock on the new side. I was there for two days. There were 6 people all together, four of those five were people I had not previously been with. I was not tested for coronavirus.
25. I slept alone in a cell with a toilet and a sink. We have a limited amount of soap there. Everyone shares one shower. I've never seen it cleaned. I never saw any disinfectant, and never saw anyone wipe it down. We also share tables. In the two days I was there, the

tables were never cleaned. There is one telephone. It was not wiped down. None of the inmates had masks or gloves. Some staff wore masks and gloves and some didn't.

26. About a day after I got on that rock, I still had the same blankets, but I was given a different mat. It was better than the mat in mental health but not clean.
27. Jail staff still didn't talk about coronavirus.
28. A few days ago I got transferred to the old jail. I am in a single man cell with a sink and toilet. We are out of our cells from breakfast to 6 pm. The other inmates told me that someone on our rock got really sick before I came. He is not there anymore but his stuff is still in his cell. They took him to medical and never brought him back.
29. We haven't been able to shower in a couple of days because the shower is flooded. We get a couple of bars of soap every week, but they're the little hotel bars.
30. The tables are only cleaned if we clean them. They give us a bottled cleaning spray, rag, and a mop that they change once a week, but we only have access to the spray bottle once a day, in the morning.
31. There's one telephone for everyone to share. We can only clean it once daily – in the morning when we have the spray. Nobody comes in to clean.
32. When I arrived on the rock, no one had masks. The deputies serve us food on the old side where I am now. They inconsistently wear masks and gloves. Sometimes one or the other, sometimes nothing, and sometimes both.
33. The cell bars are not cleaned, and I have black mold in my room on the top corner on my cell.
34. The nurses come around if they need to pass out meds.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Dominick Kelly on April 16, 2020.

By: /s/ Allison L. Kriger  
Allison Kriger

Date: April 16, 2020

DECLARATION OF SHANE CARLINE

*I, Shane Carline, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746:*

1. My name is Shane Carline. I am 33 years old, and I have been at the Wayne County Jail since January of 2020. I am currently being housed in Ward 509 at Division II (also known as the “old jail”).
2. I am in a one-man cell.
3. I have hepatitis C, and I have a high liver enzyme count. So, I am more susceptible to infection. I have not been given any medication.
4. There are three guys on the rock. We had a fourth, Davonte Velez, but he was taken out because he was sick. He was sick for four days before he was removed from the rock. We didn't have any masks at that point.
5. Until April 17, Mr. Velez's personal belongings was still in his cell. I complained to the jail that Mr. Velez's stuff should be removed because it posed a health risk. In response, a deputy ordered me to clean it up. I was not given any gloves.
6. All of the inmates share one shower. On or about April 8 the shower flooded, and was unusable. We kept asking the jail to fix the shower, but no one came to fix it until April 15. No one was able to shower for those 7 days. While the showers were out people were taking bird baths.
7. Food is served at the only table on the rock. That's where everyone eats. Although we have masks, we all take them off to eat, and we are only a couple of feet away from each other.
8. The deputies serve food. They wear masks and gloves, but they touch a number a number of surfaces with the gloves that they use to touch the food boxes that they hand to us. They use those gloves to touch the cart that they bring the food trays on, the juice they hand us from a milk crate.
9. We only have access to cleaning supplies once in the morning. We get a mop, a bucket with disinfectant, a broom, and a dustpan.
10. All of the inmates share one tablet and one telephone. We don't have any way to clean the tablet or phone after each use. We can only clean them once daily.
11. We were given masks on April 10. They are cloth surgical masks. Some of the jail staff is wearing masks and gloves, but some are not.  
  
We're given three hotel bars of soap per week to wash clothes, hands, bodies. They are palm size, and it makes me break out with little bumps and what looks like psoriasis. If we run out, we have to ask another inmate. The jail won't give us more soap, and we don't have access to hand sanitizer.
12. We wash our clothes in the sink or shower. I use the same towel to dry my hands as I do to shower. We get a clean uniform once weekly, but sometimes it is every two weeks. Laundry has been inconsistent. This week, for example, we got new towels but no new blankets. We've had the same blankets for three weeks.

13. No one has been tested for COVID. I know of only one person who was screen and that was done by taking his temperature.
14. A couple of weeks ago, I tried to commit suicide. I swallowed a bunch of meds. I woke up in the hospital. The deputy who escorted me wasn't wearing any protective wear the entire time. When I got back to the jail, I went to the mental health ward where I was locked down for 24 hours to make sure I wasn't suicidal. Then I was put back in general population without any testing or screening.
15. The Jail isn't telling us anything about COVID. When I ask about COVID they dismiss what we have to say. When inmates say they are scared or in fear of getting sick or dying, the deputies tell us that we are in the best place possible. One deputy told us that he had been exposed to people with the virus but hadn't caught it.
16. A week and a half ago, the jail hung signs on the bars saying "use a tissue for coughs" and "avoid touching your face." We have no tissue, but we have toilet paper. However, we only one roll per week, and if we run out we are told that we cannot get anymore. We have to borrow extra from our neighbors.
17. To put in a request for med attention, you have to fill out a medial kite. You can do it once in the morning or once at night. Then, you have to wait for someone to respond. It took the jail two and a half weeks to respond to my request about my hepatitis condition.
18. Nurses come in the morning to distribute medication and at night. Sometimes they don't bring medication at all. The medical staff is wearing gloves and masks, but when they distribute medication, they use and reuse the same cups for multiple inmates. At times, the medical staff does not pay attention and passes out incorrect medication.
19. In terms of staffing levels, I have noticed the deputies are coming around less. Usually they make rounds every 30 mins, but lately it's been every two hours.
20. People are in fear for their lives. We hear all of this horrible stuff on the news, and we People feel like they're not being protected.
21. The conditions in here are horrible. There is lead paint chipping off the ceiling. There's black mold in the showers. All around the drain in the shower is broken.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Shane Carline on April 22, 2020.

By: /s/ Allison L. Kriger  
Allison Kriger

Date: April 22, 2020

DECLARATION OF CARL SMELLEY

*I, Carl Smelley, certify under penalty of perjury that the following statement is true and correct:*

1. My name is Carl Smelley. I am 38 years old. I am currently incarcerated at the Wayne County Jail-Division II ("Old Jail") in Detroit, Michigan on cellblock 604. I have been in the jail since November of 2019.
2. I have hypertension, diabetes, sickle cell, and acid reflux. I'm scared of dying from COVID. Everyone around me is scared of dying and never getting to see our families again. Everyone in here knows that if they get sick, we're not going to get the medical treatment we need. We're the lowest people on the totem pole.
3. Regular requests for medical treatment take anywhere from two weeks to one month. And, that's if we get any response at all. It's not uncommon for the jail not to respond. There is a guy on my unit who is sick right now. He's been sick in the bathroom a lot. He asked for medical treatment, but the deputies just dismiss requests for medical attention.
4. No one has been tested. You have to almost be dead before they're going to consider testing or evaluating you. And, lately, the inmates have been scared to tell the jail staff that they feel sick because they have been responding with threats. The deputies tell us that if we complain about being sick they'll "quarantine" us, but what that really means is that we will get disciplined. A couple of deputies came by the rock after two guys were disciplined for talking about jail conditions to someone using one of the tablets. The video was released to the news, and the deputies were laughing, saying, "they [the inmates] got what they wanted. Now they're on 24 hour lockdown. They're safe"
5. I am in a one-person cell with a single bunk, a sink, and a toilet. The toilet doesn't have a lid, and it is approximately a couple of feet away from my bed.
6. Including me, there are five guys total on this cellblock. From 6:00 am to about 10:00 pm we are outside of our cells. We share one shower, one tablet, one phone, one bench for eating and the same bench for watching tv between all five guys. If we are all sitting at the bench, we're body to body. We are sitting so close to one another that we can't even put our elbows up.
7. The jail gave each of us one mask on April 11. It is a cloth surgical mask. We have not received a clean one since. When we are sitting on the bench for meals, no one is wearing their mask.
8. Meals are served on trays by the Deputies. Sometimes the deputies who serve food are not wearing masks and sometimes they are. They use gloves, but they are already wearing the gloves when they come into the unit. They use the same gloves to touch multiple surfaces before they touch our trays.
9. After we are finished eating, the tables are not sanitized. We don't have any access to disinfectant of any kind, so we have to use water and an old ripped towel to wipe the tables down. That is also true with the shower, phone, and tablet.
10. Jail staff comes in to clean the shower once a week or every other week. I have never seen the phone or tablet cleaned.
11. The inmates each get three two-inch bars of bar soap per week. We use that soap for washing our body, hands, and clothes because they only change linens and clothing once per month. If we run out of soap, the jail will not give us any more soap, even if we ask for soap. The soap that they give us is the worst soap ever. It dries my skin out. If we want any extra soap, we have to buy it through commissary. One bar of soap is \$1.65.

12. We have no access to kleenex or paper towel. We only get one roll of toilet paper per week. We don't get more if we run out. The deputies said they were told they are only allowed to pass out one roll per week.
13. The jail hasn't given us any information about COVID or hung any posters. They only tell us that we are in the best position in here because we haven't been outside. Otherwise, the only way I know about COVID is from the news.
14. Commander Collins was on my rock right before he died. I know of multiple deputies who were on our rock who have been diagnosed with COVID. Still, some of the deputies do not wear masks or gloves.
15. On April 13, I was arraigned by video. I was handcuffed by a deputy who was not wearing a mask. He took me to the new jail where I was placed next to about four other guys who I had never seen before. None of us were wearing masks or gloves. Then, after the arraignment, I was taken back to the old jail and placed back on 604. I was not tested or otherwise screened for COVID before or after the arraignment. They did not even take my temperature.

This declaration was orally sworn to by Carl Smelley on April 22, 2020. Because he is in custody, I am unable to obtain his signature.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Carl Smelley. on April 22, 2020.

By: /s/ Allison L. Kriger  
Allison Kriger

Date: April 22, 2020

DECLARATION OF MARLON BLANKS

*I, Marlon Blanks, certify under penalty of perjury that the following statement is true and correct:*

1. My name is Marlon Blanks. I am 26 years old, and I have been in custody at the Wayne County Jail since April 7, 2020.
2. I have COVID-19, and I am scared I am going to die because I have severe asthma. I have a prescription for an inhaler to control and treat my asthma, but the jail has refused to give it to me. I have repeatedly asked the deputies and medical staff for my inhaler but they dismiss my requests. One deputy told me to “fuck off” and a nurse responded that “I didn’t know what I was talking about.”
3. When I first arrived at the Jail, I was held in “quarantine” for four days on the 11<sup>th</sup> floor of Division I (the “New Jail”). There were 8-10 other men in the unit, and although we each had our own cell, air freely passed between cells. No one was tested, no one was wearing masks, and at least two new detainees were brought into the unit while I was there.
4. For whatever reason, after the first night, I was moved to a different cell within the unit, and after the second night, I was moved again, but I remained in the unit. The sink in the first cell was unusable because the sink and toilet water were connected, and the sink water appeared to be tainted with fecal matter. The sink water in the second cell was greenish in color, and the basin smelled moldy.
5. All the men in the unit shared two tables, a shower, and two phones. Even though one of the guys in the unit was ill, we had no access to cleaning products, and the jail staff did not clean any point.
6. During the first day, we were out of our cells for about six hours. The following three days, we were only out for about an hour. The Jail provided us with two two-inch bars of soap, but because we had so little time the last three days, I had to choose between showering and calling my family to check in.
7. The deputies were responsible for serving food. Only one in three wore masks and gloves. For the first two days, we all ate at the tables. It was impossible to maintain a distance of six feet from any other person. The last two days, we ate in our cells.
8. On or about April 11, I was transferred to Division I (the “Old Jail”). I received a new uniform, but I had to use the same towel and linens that I was provided in Division I.
9. I am now in the coronavirus wing on the 14<sup>th</sup> floor of the Old Jail. There are about ten guys in this unit. Everyone in the unit has tested positive for COVID-19, and the Jail is bringing new guys in all the time. They also have the virus. I’m not sure how we are supposed to get better if they keep doing that.
10. I am in a one-person cell, but we share one shower, a couple tablets, and a phone. There is a television in the unit, but there is no seating, so we all crowd around the television on the floor or standing up leaning against a railing. We all have masks, but some of the guys don’t wear them. None of us have gloves.
11. The unit has only been cleaned once in two weeks, and we don’t have access to disinfectant. Every morning, we get a mop bucket with the same water from the day before. I’m not sure whether the Jail puts any disinfectant in the water.
12. The Jail provides us with soap once weekly. Everyone always runs out, but the Jail won’t give us more, even if we ask. We do not have access to paper towel, so if we wash our hands, we use our towel or uniform to dry them. We only get no more than one roll of toilet paper weekly, and we do not have access to hand sanitizer.

13. I have only gotten one new uniform since I was transferred to Division II, and I have not received a new towel or new linens.
14. Initially, the Jail staff didn't tell anyone in the unit that we were infected with the coronavirus, and we didn't think to ask until we noticed the deputies wearing hazmat suits and infrequently doing rounds. When we asked the Jail staff what was going on, they told us they turned our unit into the infirmary, but there is notable difference between our unit and any other. There's no medical equipment, oxygen, ventilators, and we aren't getting any medication.
15. The Jail hasn't given us any additional information about COVID-19, but a nurse posted a sheet of paper up that lists COVID-19 symptoms.
16. We're all very concerned. The Jail seems to be hiding what is going on. Most of the time, the deputies are just dismissive, and they treat us like we're less than human. Some people have worse symptoms than others, but no one is getting any real medical care. We are all scared of dying.

This declaration was orally sworn to by Marlon Blanks on April 28, 2020. Because he is in custody, I am unable to obtain his signature.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Marlon Blanks on April 28, 2020.

/s/ Allison L. Kriger  
ALLISON L. KRIGER

April 28, 2020  
DATE

### DECLARATION OF CALDERONE PEARSON

*I, Calderone Pearson, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746:*

1. My name is CalDerone Pearson. I am 30 years old. I am currently incarcerated in the Wayne County Jail Dickerson Facility.
2. Until April 27<sup>th</sup>, 2020 I was a trustee in the jail, I worked in the laundry room. I usually worked from 7:30AM to 2PM. During my shift there were 8 or 9 workers and 2 supervisors. They bring the laundry from all of the jail facilities to Dickerson to be cleaned, including from the facilities downtown.
3. Being in this jail gives me a lot of anxiety, I am always thinking about if I have the virus. Sometimes I feel like I am having a hot flash because I am so anxious.
4. No one in the facility has been tested.
5. There was one guy on my pod when I lived in E1 who was sick for at least two weeks and I'm pretty sure he was sick with the virus. He was coughing and vomiting every day. The nurse would come to our pod and give him Tylenol two or three times a day. He went to the medical unit at least twice and they kept sending him back to the pod. After lockdown each night you could hear him coughing throughout the pod. It was so loud it sounded like a dog barking. He was finally taken out and he died a few days ago.
6. On E1 there were about 30 men on my pod. We shared a common area that is about 20 x 20 feet. It is impossible to stay six feet away from other people in the common areas. We shared the same tables at meals, three to a table, and watch TV in the common area.
7. We all shared the same showers and the same toilets. There were 4 showers and 2 toilets on my floor.
8. Until April 27<sup>th</sup>, our food was prepared by other inmates. One day two of the cooks came out and said they haven't been able to taste or smell. The cooks do not wear face masks while they are making our food. One of the civilian workers in the kitchen had coronavirus. I think she had to take time off to recover.
9. On E1 there were 6 pod workers. Two pod workers serve the breakfast trays to the other inmates.
10. We were constantly asking for masks. Some of the guys have asthma and COPD. One guard tried before we finally got them but was told no because the masks have a small metal piece.

11. When we finally got masks we were told we had to keep them for two weeks. After one day they were worn down and used. The masks they gave us are blue on the outside and white on the inside. They look like a surgical mask. I asked about getting N95 masks and the corporal said to me "if we don't have those masks why would you?"
12. Some of the deputies don't wear masks, but they tell us if we don't wear the masks we will get locked down.
13. At least ten guys were sick when I was on E1 pod. One day they were fine, and the next day they were so weak they could hardly walk and looked like they were about to fall over. This lasts about 10 days and then they seem to start feeling better.
14. There was a nurse who came to our pod to bring people their medicine. Every time she told us not to talk to her unless we already receive medicine. She gave us a hard time if we tried to ask for help. Some of the inmates try to argue with her but she always says the same thing. In order to get a medical appointment we have to fill out a request form, called a kite, and she won't give us the forms. She will tell us to get out of line.
15. The guards in my unit wear masks and gloves. One guard even had on a hazmat suit. When they come in to the pod they spray their computer and desk with Lysol. When we ask to use the Lysol to clean our own cells they tell us no.
16. We have not heard anything about COVID-19 from the jail staff. Everything I have learned about this disease has come from watching TV.
17. If anyone has any symptoms of the disease they are given a Tylenol and sent back to the pod.
18. I was moved to Unit G1, cell 115, where they put people during intake. The cell was disgusting so I asked for cleaning solution. There was dried urine in the toilet. The whole cell smelled like urine. The toilet bowl is white but has turned orange because of the dried waste. There was hair everywhere in the cell and the floor, and in the sink. There were many short pieces of hair. I asked for a mop and a toilet brush to clean the cell. The guard told me to use C-Folds, those are the paper towels. We have to ask every time we need to use them. He said I should use those to clean the toilet with my bare hands. After I asked for more supplies the guard got irritated and said here just take the bottle of the cleaning solution and gave me the simple green. I don't think simple green works. If it did why don't the guards use it to clean their stuff?
19. When I started sweeping I noticed small black bugs popping up off the floor in the cell. I went back and asked the guard to move me. Then I moved to cell 116. I then tried to clean this cell with the same broom and saw more bugs. I asked to be moved again and the guard said I couldn't move. I asked to speak with the sergeant, he came and said I was disobeying an order and I was moved to segregation. In segregation there

was no hot water there to take a shower. I asked to get cleaning solution and all they gave me was simple green.

20. I was in segregation for three days. It is 23 hour lock down and you stay in your cell all day. There is no access to commissary and you can't use the phone. They give you your meals through a slot in the door.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to CalDerone Pearson on April 30, 2020.

/s/ Ashley Carter

By: Ashley Carter

Date: April 30, 2020

### DECLARATION OF CHARLES RUSSELL

*I, Charles Russell, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746:*

1. My name is Charles Russell. I am 59 years old. I have been in the Wayne County Jail Dickerson Facility since March 20<sup>th</sup>, 2020. I am currently living division E1. Before this I was on division G1 where they do intake.
2. I have stage 3 prostate cancer. I am diabetic, have high blood pressure and an umbilical hernia that is trying to come through my skin.
3. I have not been taken to radiation treatments since being in the jail. I am supposed to go 5 days a week. The only medicine I have been given is Flomax.
4. I am sure my doctors are wondering where I am. I was in treatment Monday through Friday at 9:45AM before coming to jail. I see a radiologist and a urologist.
5. I need my treatment really bad. If I don't get it my cancer will probably spread. I was scheduled for a minimum of 50 treatment shots.
6. In the jail they say there is no doctor for me to see. They told me there is no one to take me to my treatments because so many deputies are out sick.
7. They tell us there are no doctors available and no doctors on staff in the jail. We just found out that two of the doctors that work for the jail have died from coronavirus.
8. I live on a pod. They just added 6 or 7 more people. There are 25 people now. They keep bringing new people into our pod from the outside. It makes me nervous because there is no way for them to know if these individuals have the coronavirus. The only thing they may do is take your temperature.
9. We all share the bathroom on my pod. There are 8 showers but only three work. There are 8 toilets and 8 sinks, 4 of the toilets are out of service. It's pretty sad.
10. People are on the phones constantly trying to talk to family. There are 8 phones on the pod that we all share. I am in charge of cleaning them. This is a job that I took on myself for my own health and protection and the health of the other inmates. I clean them three times a day some sort of cleaning liquid. There is no label so I don't know what it is. I have to ask the officers for gloves to clean with. One day we had no gloves. People were using garbage bags to cover their hands and serve our food.
11. Each day we get three meals. Until recently we got a cold breakfast and a hot lunch and dinner. Now we get a cold breakfast, a hot lunch and a cold dinner, 2 bologna sandwiches. I have a personal cup that I use that I bought from the commissary. I have had to make my

own disinfectant. I use shampoo, Irish spring soap that I brought from the commissary and a spray that I got. They give us soap but it's nothing like what you would buy at a store.

12. I don't know how much things cost exactly. I have a \$45 dollar charge on my commissary account for an identification bracelet the jail requires us to buy. If anyone puts money on my account it will be taken to pay this fee so I ask other inmates to purchase my soap for me. I think it costs \$1.65.
13. The only information we get is from the news. They haven't given us anything or any information, there is nothing even posted on the pod, but the officers protect themselves.
14. The jail is not as clean as it should be. We should get bleach to clean. Right now only the deputies have it and they keep it in a secluded area that only they can access. They won't allow us to clean our rooms with it, or even add it to the water that we mop with. They don't use it in the dining area either. They use a diluted cleaning soap for that. We use the same stuff to clean the floors, the bathrooms, the tables.
15. It is very stressful. I am waiting to see a judge but they have been putting my case off for weeks. Now they don't even know when I will go back to court. They only send a few people each day to court on video. It is like you have to wait for your name to be called.
16. I've had 4 dry runs to go to court. That is when there is a scheduled court date but I haven't been able to actually have my appearance. They keep telling me to be patient. The guards in classification told me that because I'm accused of a probation violation I'm a low priority. There are at least three others on my pod like me waiting to see a judge.
17. It is hard to do social distancing because we are always in contact. I'm scared every night. A lot of us are scared. After two weeks of suffering they took this guy to the hospital and two days later he died. There are a couple individuals who are sick on my pod. The guards don't believe people when they say they are sick.
18. Two weeks ago I had a bad headache, nausea, was feverish and stayed in bed all day. I spoke with the nurse and she said there was nothing she could do because there was no doctor. She didn't give me anything.
19. They just opened up a pod for coronavirus victims and they have them on oxygen. They are bringing them from downtown. They moved people out of a pod to use it for that.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Charles Russell on April 28, 2020.

/s/ Ashley Carter

By: Ashley Carter

Date: April 28, 2020

### **DECLARATION OF CHRISTOPHER HUBBARD**

*I, Christopher Hubbard, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746:*

1. My name is Christopher Hubbard. I am currently incarcerated in the Wayne County Jail Dickerson facility. I am 26 years old. I have been in the jail since February 24, 2020. I currently live in unit E1. Before this I spent 14 days in unit F1 and 5 days in unit H1.
2. I am diabetic and I have asthma. I had pneumonia last fall, around October 2019. I have had pneumonia at least three other times.
3. When I first got to this unit I was placed in the cell Michael Meshinski was in, the guy who died from coronavirus. Another inmate told me that it had been his cell. I checked with a deputy who looked in the system and it was true. I asked to be moved right away. I don't think they even cleaned the room before I was moved there.
4. I got moved to another cell. I try to clean my own room. I use simply green and soap that I purchased from the commissary. The soap costs about \$1.62.
5. On the pod we all share a bathroom. There are 8 toilets and 8 sinks. Some of the sinks are stopped up and all of the showers don't have hot water.
6. The inmates clean the bathroom. They are called unit workers. They use a green chemical called Simple Green. Every two weeks a corrections officer uses bleach to spray the bathroom. They don't use this bleach to clean the cells. The officers use Lysol to clean their own areas. We aren't allowed to use it for ours.
7. The common area is cleaned at night with simple green. There are 2 tvs and 12 small couches that we all share. We eat meals together, 4 people to a table. The table is about 4 ½ feet by 3 feet.
8. I don't think simple green works because if it did the officers wouldn't bring their own supplies. They bring Lysol, I saw one bring pine sol, they have other name brand supplies. They don't let us use it when we ask.
9. We got masks a few weeks ago but we don't have gloves. Some unit workers have gloves but they don't even have enough for all of them. A few days ago the guys serving food didn't have gloves and they were using plastic bags to cover their hands.
10. I got into an argument with an officer about my insulin and he put me in the hole for 7 days. It was around lockdown time when we are all supposed to go to bed. I asked if he could call the medical workers and ask about my insulin and inhalers because my blood sugar has been super high. He said he would get to it. I went to get water from the sink in the common area which is the cleanest one and he told me to go to the bathroom to get the water. I told him that this was messed up and that I was being medically neglected. I didn't

want to use the sink in the bathroom because it's dirtier and people leave stuff in it. He said if I didn't like it then I shouldn't come to jail. I told him that just because we are here doesn't mean that they can treat us poorly and deny our medical needs.

11. The hole is even more messed up than other parts of the jail because it's where they have people who are showing symptoms of coronavirus.
12. There are individual cells and it is packed down there. You can hear people coughing. You can see officers really suited up, like covered from head to toe. There are showers but the water is so cold you can't really use it. They are supposed to let us out for an hour each day but they usually don't.
13. The hole does not smell good. It smells musty and in the cells it feels damp like a basement. There were probably 17 people down there when I left. Inside my room was a bed, toilet connected to a sink, a small mirror and a window that I could not see out of. I saw mice and roaches down there.
14. In the hole they don't really change our sheets or do the laundry. They are supposed to do it once a week but they don't.
15. They give us food through a slot in the door.
16. When I was in the hole I felt pissed, sad and mad. I was depressed and worried.
17. They are supposed to check my blood sugar at least one time per day. They've gone from testing once a day to once a week.
18. I spoke to a nurse who knows I'm supposed to get insulin. In here they give me a pill that is different than what I take outside of the jail. The nurse said that if it makes me feel funny I should stop taking it.
19. I need insulin coverage and the correct inhaler. I requested a steroid inhaler and they keep bringing an albuterol inhaler. If my blood sugar gets too high I could go into a diabetic coma.
20. Outside of the jail I usually go to the doctor once a month. I try to work out a lot and try eat healthy. The food they give us here has a lot of starch and causes my blood sugar to be raised.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Christopher Hubbard on April 27, 2020.

/s/ Ashley Carter

By: Ashley Carter

Date: April 26, 2020

## DECLARATION OF MARK MALEC

*I, MARK MALEC, certify under penalty of perjury that the following statement is true and correct:*

1. My name is Mark Malec. I am 38 years old. I am currently incarcerated at the Wayne County Jail-Division III ("Dickerson") in Hamtramck, Michigan. I have been in the Jail since January 12, 2020. From January 12 to April 20, I was in in cellblock E-1. On April 20, I was diagnosed with COVID-19, and was moved to a different unit.
2. I have asthma, low blood sugar, and kidney problems. I recently had surgery to remove kidney stones, and I have a fractured spine for which I am prescribed medication. On April 20, I was diagnosed with COVID-19.
3. The Jail hasn't given us any information about COVID-19. At the beginning of April, they started making announcements every day at 4:00 pm. They told us to maintain social distancing, but then they would acknowledge that they knew that wasn't possible. They also told us that we should wash our hands, but, when they first started telling us that, one of the deputies commented that he knew we were out of soap. It is common for us to run out of soap. Lately, however, the Jail has been keeping soap in stock.
4. After I learned about COVID-19 from the news and from my girlfriend more than a month ago, I was really scared. The Jail has done almost nothing to protect anyone. They still aren't doing enough. That's why I am not at all surprised that I got COVID-19.
5. In mid-March, Michael Meshinski, a guy in my unit who worked in the laundry department and was responsible for laundry for the entire Jail, started coughing constantly and all over the unit. This lasted for about three weeks. At that time, there were about 50 of us inmates living in E-1, and none of the inmates had masks or gloves. We all had our own cell to sleep in, but during the day were all packed together into a common space with bad ventilation that makes it almost impossible to get six feet away from anyone at any given time. All of us share showers, toilets, sinks, telephones, tablets, and tables. Those surfaces are cleaned by the inmates with a green spray only twice a day, once at 2:00 pm and once at 10:00 pm. The spray is Simple Green, which is not a disinfectant.
6. During the three weeks that Michael was coughing, he was taken to medical a few times, but he always came back to our unit that same day. On or about April 1, a deputy came in and looked at Michael, and seemed to notice how obviously sick he was. The deputy said something about Michael needing to go to medical. After that, he left our unit and never came back. A sergeant came to our unit, sprayed Michael's room down, and took all of his stuff out. We asked the Sergeant, "did he have COVID?" and the Sergeant responded, "I can't confirm that and I can't deny that."
7. After Michael Mishinski died, the Jail responded to the news coverage by saying that we all had masks. That was completely untrue. The first time we ever got masks was on April 9. They are cloth masks like you see at the dentist office. They told us we have to use these

for two weeks, and then after two weeks, we can get a clean one. The Jail also publicly said that nobody in here has any symptoms. That is also completely untrue, and they know it.

8. A lot of the guys have been sick throughout the past several weeks. I first started feeling sick in early April. I had head aches and I wasn't able to taste anything for a couple of weeks. I've also had a cough and a cold and was coughing up black phlegm. When I first started feeling sick, I complained to the guards, and they told me to tell a nurse. I told the nurse that I thought I had the virus. She asked if I had a fever, but she didn't take my temperature and didn't test me. She gave me Tylenol. The medical staff gets hostile if the inmates complain about feeling sick, and their response is always that we should take Tylenol. One of the guys in my unit complained a few times, and never got any medical attention. And, there's another guy in my unit with cancer who hasn't had any treatment in over a month.
9. I kept telling the guards and nurses that I was sure I had COVID-19 because of my symptoms. They didn't test me until April 20, and I tested positive for COVID-19. I have been in what the Jail calls "quarantine" since then. Really, it's just a regular unit but no one can come out of their cell, except for once a day. The Jail keeps bringing more sick people into the unit, so we keep getting exposed to the virus again, and I feel like I won't ever get healthy. We are not in any kind of pressurized rooms. The air just passes freely from one cell to the other.
10. The deputies hand out meals, which we eat in our cells. Some of them wear gloves and masks and some of them don't. All of the detainees wear masks but not gloves, and we all share tablets, phones, and showers. They are cleaned with Simple Green after each use, but with disinfectant only once weekly.
11. The Jail has not provided any real medical treatment for COVID-19 patients. We have not seen doctors, and there is no special equipment. We are getting Tylenol, cough syrup, and Gatorade. We are all still scared to death.
12. I'm not even supposed to be locked up anymore. I completed my sentence to the jail plus program, and I don't know why I'm not out yet.

This declaration was orally sworn to by Mark Malec on April 28, 2020 because he is in custody, I am unable to obtain his signature.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Mark Malec on April 28, 2020.

/s/ Allison L. Kriger  
ALLISON L. KRIGER

April 28, 2020  
DATE

### DECLARATION OF HARRY WHITE

*I, Harry White, certify under penalty of perjury that the following statement is true and correct pursuant to 28 U.S.C. §1746:*

1. My name is Harry White. I am 36 years old. I have been in the jail since February 2020.
2. I have a bullet on my spine and a heart murmur. I suffer from paralysis where sometimes I lose feeling in my feet and hands. I can't stand or walk for long.
3. I am currently on pod E3, one of the workers pods. Before this I lived on G3, another workers pod. This is where people in the work release program live. It's pretty nasty. The floors and walls are dusty. About 5-7 men left every day to go to work and then they return back here. It was an open pod. There was an open area with 4 beds. We all shared the bathroom, about 45 of us. There were 4 bathrooms with showers on the upper level and 4 bathrooms with showers on the lower level. Before C1 I lived on G3.
4. They gave us a paper mask that only gets changed every two weeks. The mask tears easily, it's the cheapest mask you could ever wear. Once you wear it it tears on the sides.
5. I bought my own soap. They have some soap that they give people but you have to ask the officers for it at their desk. We don't have access to paper towel, we have to ask the guards for napkins and for toilet paper.
6. There is a guard on my pod who had coronavirus. He came back but he still seems sick and shows symptoms. You can hear him coughing all night long.
7. I've been kiting to the doctors but I haven't seen one yet. I send a kite every day. I don't think the nurse turns them in because there is no doctor.
8. When I had a tooth cracked I was sent to the dentist. She gave me an ibuprofen and said to let her know if I wanted it pulled.
9. I need medicine to help me for pain and also for my nerves because of the bullet on my spine. With the pain it is hard to move around. The pain feels like pins in my hands and feet. The only thing they give me is one ibuprofen and tell me to see a doctor but there isn't one.
10. When I'm not in jail I go to the doctor frequently, like every week. I'm supposed to start physical therapy. After I was shot I had to learn to walk again. I was supposed to be placed on a medical floor but it never happened.
11. When I first got here I used to tell the deputies about my pain every day. They said if you aren't dying you're not going to see a doctor.

12. I see coronavirus on TV and keep hearing someone in the kitchen died. When the guards hear something bad coming from the TV they unplug it.
13. No one has been tested for coronavirus.
14. I'm nervous and scared to be in the jail. If I catch any disease I don't know if I'll make it because of my heart murmur.
15. I can feel things getting worse. I was taking meds for my nerves, without it it's hard for me to get out of bed. I'm supposed to take it three times per day. When I wake up my hands and feet are numb. When I try to walk it feels like my bones are cracking. I've noticed I've started to walk with a limp. All they've given me is ibuprofen.
16. Some days I miss breakfast or lunch because I can't get out of bed. I had a surgery in my stomach to try and remove the bullet. The doctors told me I have to be careful because of where the bullet is on my spine.
17. If I get sick or catch corona I won't last long in here. They are treating us worse than animals.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Harry White on April 28, 2020.

/s/ Ashley Carter

By: Ashley Carter

Date: April 28, 2020

DECLARATION OF DAVONTE VELEZ

*I, Davonte Velez, certify under penalty of perjury that the following statement is true and correct:*

1. My name is Davonte Velez. I am 26 years old, and I have been in custody at the Wayne County Jail since March 26, 2019.
2. I have asthma for which I was prescribed an albuterol inhaler before I was detained. And, in the past my asthma has been so bad that I have had to do a breathing treatment. I have not had an inhaler since I got locked up. I've asked the jail for it, and my family has called, but the Jail won't give it to me because it's not on my medical sheet. I am terrified because I tested positive for COVID-19 earlier this month and again a couple of weeks later.
3. I started to feel ill on April 2, 2020. I was in the "Old Jail" at the time, and no one had masks or gloves. I spoke to one of the deputies, Officer Peoples, and he told me that I should lie down.
4. I consistently asked for medical treatment for the next five days. In addition to telling the guards about how I didn't feel well, I also filled out medical kite, and spoke to a nurse about how I felt. I said that I had shakes, that I was coughing, and that I didn't have an appetite. In response, she gave me Tylenol, but she did not check my temperature, nor did she test me for COVID-19.
5. Finally, after five days, on April 7, I spoke to the deputy on duty. He took me in the hallway and called a nurse who took my temperature. It was 103.
6. I was taken to the medical unit at the "New Jail." I waited in the waiting room for approximately two hours, after which I was transported to Dickerson.
7. I was initially placed in segregation. There were about three us there. Then, I was moved to CMU, the medical unit. There were about five other men in that unit, all of whom were sick. We all shared a shower, but we were essentially unable to use it because the hot water didn't work.
8. Shortly after I arrived, CMU flooded with toilet water so we had to move to H-3.
9. There are approximately 11 men in H-3. We are locked in our rooms for 23 hours per day. They Jail lets us out for one hour per day. They stagger us so we are all out at different times. Outside of our rooms, there is a common area with tables, a shower, tablets, and phones. Everyone shares those things. The unit is cleaned before the next person comes out, but the Jail uses only Simple Green to clean, which is not a disinfectant. I have never seen anybody clean with bleach or lysol or anything like that.
10. The Jail doesn't tell us anything about COVID-19. The Jail didn't even tell me I had tested positive for the virus until two weeks after I was transferred to Dickerson. When I asked why they waited so long to tell me, the Jail said two doctors had died so they have to send all of the records to some doctors in Atlanta.
11. Recently, I was tested again, and I still tested positive for COVID-19. There is another guy in H-3 who has tested positive three times since April 6. I'm really scared because I know this virus can kill people with asthma, and I'm not getting better. The virus is supposed to go away after two weeks, but I've been sick for almost one month. The Jail keeps transferring new sick men into the unit, and everyone has different symptoms. Even though we all have masks, I told the Jail that it seems like no one will get better if we keep getting reexposed to the virus.

12. Being locked in a room for 23 hours per day without being able to talk to anyone is causing me and some of the other guys to have psychological problems. For 23 hours per day I think about how I'm stuck in here with all of these sick people and I'm not getting better. When I try to ask the Jail staff about COVID-19 and what's going on, they don't give me any answers. It seems like no one knows what's going on and they don't have any system in place to deal with the pandemic.

This declaration was orally sworn to by Davonte Velez on April 29, 2020. Because he is in custody, I am unable to obtain his signature.

Under penalties of perjury, I declare that I have read the foregoing in its entirety to Davonte Velez on April 29, 2020.

/s/ Allison L. Kriger  
ALLISON L. KRIGER

April 29, 2020  
DATE

**Avendaño Hernandez v. Decker, Slip Copy (2020)**

2020 WL 1547459

Only the Westlaw citation is currently available.  
United States District Court, S.D. New York.

Gaspar AVENDAÑO HERNANDEZ, Petitioner,  
v.  
Thomas DECKER et al., Respondents.

20-CV-1589 (JPO)

Signed April 1, 2020

Filed 03/31/2020

**Attorneys and Law Firms**

Alina Das, Washington Square Legal Services, Inc., New York, NY, Hannah McCrea, Brooklyn Defender Services, Paige Austin, Make the Road New York, Brooklyn, NY, for Petitioner.

Michael James Byars, U.S. Attorney's Office, New York, NY, for Respondents.

**OPINION AND ORDER**

J. PAUL OETKEN, District Judge:

\*1 In this action, a petition for a writ of habeas corpus under 28 U.S.C. § 2241, Gaspar Avendaño Hernandez seeks relief from his detention by U.S. Immigration and Customs Enforcement. Avendaño Hernandez has filed a letter motion to compel Respondents to release him pursuant to *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). (Dkt. No. 9.) For the reasons that follow, the motion is granted.

**I. Background**

The following facts are taken from the petition for writ of habeas corpus, as amended, and are essentially undisputed for purposes of this motion. (*See* Dkt. No. 12 (“Pet.”).)

Petitioner Gaspar Avendaño Hernandez is a resident of Brooklyn, New York. (Pet. ¶ 1.) On February 6, 2020, he was arrested by U.S. Immigration and Customs Enforcement, or ICE, and detained at the Hudson County Correction Facility. (Pet. ¶¶ 15, 45.) On February 24, 2020, Petitioner filed a habeas petition asserting four claims — including, most relevantly, a claim that he is being denied adequate medical care. (Dkt. No. 1 ¶ 110–15.) On March 30, 2020, Petitioner filed an amended habeas petition asserting the same claim in the renewed context of the COVID-19 epidemic. (*See* Pet. ¶¶ 119–26)

Petitioner suffers from several severe medical conditions. During Petitioner’s arrest, ICE officers tased Petitioner between fifteen and twenty times in the legs and back. (Pet. ¶¶ 18–19.) He subsequently received medical treatment at Maimonides Medical Center, at which he was diagnosed with a **right bundle branch block**, or “an interruption or alteration of the electrical conduction of the heart.” (Pet. ¶ 33.) He was also diagnosed with **rhabdomyolysis**, “a condition in which breakdown of muscle fiber release[s] protein into the blood,” potentially resulting in “damage to the kidneys, dangerous electrolyte abnormalities, [or] death.” (Pet. ¶ 34.) Petitioner was instructed to obtain “follow-up care with a cardiac specialist,” including “an **echocardiogram** and **electrocardiogram**.” (Pet. ¶ 121.) Petitioner has not yet received this follow-up care during his detention at Hudson County Correction Facility. (Pet. ¶ 122.)

On March 22, 2020, the first case of COVID-19 was reported at Hudson County Correction Facility. (Pet. ¶ 90.) Petitioner faces an increased risk of death from COVID-19 due to his underlying medical conditions. (Pet. ¶¶ 94, 97.) Hudson County Correction Facility has implemented some measures to slow the spread of COVID-19 in the facility (Dkt. No. 11 at 4); however, “[s]ocial distancing is impossible.” (Pet. ¶ 92.)

On March 23, 2020, Petitioner filed a motion seeking interim release pending disposition of the habeas petition under *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). The motion argues that Petitioner is “particularly vulnerable to COVID-19” and that the Hudson County Correction Facility cannot “respond adequately” to the health risks posed by the disease. (Dkt. No. 9 at 1–3.)

**II. Legal Standard**

“[T]he federal courts have inherent authority to admit to

## Avendaño Hernandez v. Decker, Slip Copy (2020)

bail individuals properly within their jurisdiction.” *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). This power “is a limited one, to be exercised in special cases only.” *Id.* To obtain relief, “[t]he petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[ ] that make the grant of bail necessary to make the habeas remedy effective.” *Id.* (second alteration in original) (quoting *Grune v. Coughlin*, 913 F.2d 41, 44 (2d Cir. 1990)).

### III. Discussion

\*2 To obtain interim release under *Mapp v. Reno*, Petitioner must demonstrate both that his petition raises “substantial” claims and that “extraordinary circumstances” exist. Each requirement is discussed in turn.

#### A. Substantial Claims

Among other claims, the petition for a writ of habeas corpus asserts a claim of deliberate indifference to Petitioner’s medical needs while in detention. (Pet. ¶¶ 119–26.) Civil detainees enjoy the right to be free from deliberate indifference to their serious medical needs. *See Charles v. Orange County*, 925 F.3d 73, 85–86 (2d Cir. 2019). For federal detainees, the relevant guarantee is the Fifth Amendment’s Due Process Clause. *See id.* That guarantee encompasses the rights of Petitioner, as the Due Process Clause applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Deliberate indifference requires a two-part showing. First, Petitioner must establish that he has a serious, unmet medical need. *See Charles*, 925 F.3d at 86. Second, Petitioner must establish that Respondents acted with deliberate indifference to that need.

Here, the first requirement is easily established. A serious medical need is one that “may produce death, degeneration, or extreme pain.” *Id.* (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996)). Petitioner’s rhabdomyolysis, if left untreated, “can lead to kidney damage and death.” (Pet. ¶ 121.) Relatedly, Petitioner was also diagnosed with an abnormality in his cardiac electrical conduction. (*Id.*) Standing alone, these conditions already present a risk of “death, degeneration,

or extreme pain.” *Charles*, 925 F.3d at 86 (quoting *Hathaway*, 99 F.3d at 553). But in the context of the COVID-19 epidemic, these conditions render Petitioner peculiarly at risk of serious injury or death in the event he contracts COVID-19. (Pet. ¶ 97; *see also* Dkt. No. 12-2 at 16 (enumerating “high-risk” categories for COVID-19).) Notably, Respondents do not appear to dispute that Petitioner’s medical conditions place him in a high-risk category for experiencing serious injury or death from COVID-19. (Dkt. No. 11 at 4.)

Furthermore, Petitioner’s medical need remains unmet. The record indicates that Respondents have not taken any action to address the particular risks that COVID-19 poses to high-risk individuals like Petitioner. Rather, Respondents cite only generalized “proactive measures to prevent detainees within its care from contracting and spreading the virus,” including

modifying the intake process for all incoming detainees and pre-screening of all newly admitted detainees prior to admission to the facility ...; suspending all contact and non-contact visits at the jail; dramatically increasing sanitation frequency in housing units at the jail; and screening of all employees and vendors who enter the jail.

(Dkt. No. 11 at 4.) These measures, however, are unresponsive to Petitioner’s specific medical need — the risk posed by COVID-19 to high-risk individuals in particular. *See, e.g., Coronel v. Decker*, No. 20-CV-2472, 2020 WL 1487274, at \*5 (S.D.N.Y. Mar. 27, 2020) (“[The government] has not isolated these high-risk individuals. It has not created special safety or hygiene protocols for them or for staff interacting with them to follow.... And of course, it has not released [Petitioner], even though doing so is within the agency’s sound discretion.”). Thus, Petitioner has met the first requirement to state a claim for deliberate indifference.

\*3 The second requirement is also met. To establish that Respondents acted with deliberate indifference, Petitioner “can allege either that [they] *knew*” or that they “*should have known*” that failing to provide the complained of medical treatment would pose a substantial risk to his health.” *Charles*, 925 F.3d at 87. As an initial matter, Petitioner has established that Respondents had actual knowledge of his serious, unmet medical condition. On

**Avendaño Hernandez v. Decker, Slip Copy (2020)**

March 24, 2020, Petitioner submitted a letter to ICE detailing his medical needs and asserting, in particular, his heightened risk for serious harm or death from COVID-19 due to his underlying heart conditions. (Dkt. No. 12-2 at 59.) Respondents are therefore aware of Petitioner’s medical condition and the particularized risk posed to them by COVID-19.

Despite this knowledge, Respondents “can point to *no specific action* that [they have taken] in direct response to this serious, unmet medical need.” *Coronel*, 2020 WL 1487274, at \*5. Respondents cite “proactive measures” like modification of the intake process and increasing sanitation frequency. (Dkt. No. 11 at 4.) But even if such measures sufficed to meet the medical needs of ordinary detainees, those measures “do nothing to alleviate the *specific, serious, and unmet* medical needs of ... high-risk [detainees].” *Coronel*, 2020 WL 1487274, at \*5; *see Johnson v. Wright*, 412 F.3d 398, 404 (2d Cir. 2005) (holding that even if a policy were “generally justifiable ... the application of the policy in [a particular] case could ... amount[ ] to deliberate indifference”). Nor is it clear that these measures are “generally justifiable.” As courts in this Circuit have concluded, such measures are “patently insufficient” to protect *any* detainees from infection absent “enforcement of requisite social distancing.” *Basank v. Decker*, No. 20-CV-2518, 2020 WL 1481503, at \*5 (S.D.N.Y. Mar. 26, 2020); *see also Coronel*, 2020 WL 1487274, at \*5 (noting that “[n]one of these steps are adequate to mitigate the transmission of the virus when there’s already documented community-based transmission, and spread of coronavirus from staff, vendors, or contractors” (alteration in original)).

In short, Respondents had actual knowledge of Petitioner’s serious, unmet medical need and did nothing in response. The Court concludes that such facts state a substantial claim for deliberate indifference. *See Coronel*, 2020 WL 1487274, at \*6 (concluding petitioners were likely to succeed on deliberate-indifference claim because the government failed to “introduce[ ] any evidence of actions it took in response to the particular risk COVID-19 poses to high-risk individuals like the Petitioners”); *Basank*, 2020 WL 1481503, at \*5 (concluding petitioners were likely to succeed on deliberate-indifference-claim because the government “could [not] provide the Court with any information about steps taken to protect high-risk detainees like

Petitioners”).

**B. Extraordinary Circumstances**

Release under *Mapp* is appropriate only if “extraordinary circumstances ... make [immediately release] necessary to make the habeas remedy effective.” *Mapp*, 241 F.3d at 230 (quoting *Iuteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981)). “Severe health issues” are “the prototypical ... case of extraordinary circumstances that justify release pending adjudication of habeas.” *Coronel*, 2020 WL 1487274, at \*9. Such is the case here. Petitioner argues that he is being subject to unconstitutional conditions of confinement — specifically, continued risk of exposure to COVID-19 — and he seeks release so that he can avoid infection. “If Petitioner[ ] were to remain detained, [he] would face a significant risk that [he] would contract COVID-19 — the very outcome [he] seek[s] to avoid.” *Id.* Accordingly, immediate release is necessary to “make the habeas remedy effective.” *Mapp*, 241 F.3d at 230 (quoting *Iuteri*, 662 F.2d at 161).

**IV. Conclusion**

\*4 For the foregoing reasons, Petitioner’s motion to compel immediate release pending resolution of his habeas petition is GRANTED. The Court hereby orders Respondents to immediately release Petitioner on reasonable conditions. The parties are ordered to meet and confer and to propose reasonable bond conditions no later than April 1, 2020, at 1:00 p.m.

The Clerk of Court is directed to close the motion at Docket Number 9.

SO ORDERED.

**All Citations**

Slip Copy, 2020 WL 1547459

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
VASIF “VINCENT” BASANK; FREDDY  
BARRERA CARRERRO; MANUEL BENITEZ  
PINEDA; MIGUEL ANGEL HERNANDEZ  
BALBUENA; LATOYA LEGALL; CARLOS  
MARTINEZ; ESTANLIG MAZARIEGOS;  
MANUEL MENENDEZ; ANTAR ANDRES  
PENA; and ISIDRO PICAZO NICOLAS,

*Petitioner,*

-against-

THOMAS DECKER, in his official capacity as  
Director of the New York Field Office of U.S.  
Immigrations & Customs Enforcement; and  
CHAD WOLF, in his official capacity as Acting  
Secretary, U.S. Department of Homeland  
Security,

*Respondents.*

ANALISA TORRES, District Judge:

Petitioners, Vasif “Vincent” Basank, Freddy Barrera Carrerro, Manuel Benitez Pineda, Miguel Angel Hernandez Balbuena; Latoya Legall, Carlos Martinez, Estanlig Mazariegos, Manuel Menendez, Antar Andres Pena, and Isidro Picazo Nicolas, are currently detained by Immigration and Customs Enforcement (“ICE”) in county jails where cases of COVID-19 have been identified. Petition ¶ 1, ECF No. 9.

Last night after 11:00 p.m., Petitioners filed an amended petition for a writ of habeas corpus under 28 U.S.C. § 2241, requesting release from ICE custody because of the public health crisis posed by COVID-19. *See* Petition. Petitioners also submitted an application for a temporary restraining order (“TRO”) pursuant to Rule 65 of the Federal Rules of Civil Procedure, seeking an order (1) releasing them on their own recognizance, subject to reasonable and appropriate conditions, and (2) restraining Respondents, Thomas Decker, in his official capacity

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DATE FILED: 3/26/2020

20 Civ. 2518 (AT)

**MEMORANDUM  
AND ORDER**

as Director of the New York Field Office of ICE, and Chad Wolf, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security, from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings. TRO at 1, ECF No. 6.

For the reasons stated below, the TRO is GRANTED, and (1) Respondents, and the Hudson, Bergen, and Essex County Correctional Facilities, are ORDERED to **immediately** release Petitioners today on their own recognizance, and (2) Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings.

### BACKGROUND

Petitioners were detained by ICE in connection with removal proceedings pending at the Varick Street Immigration Court. They are housed in New Jersey county jails where either detainees or staff have tested positive for COVID-19. TRO at 3–4. Specifically, Basank, Benitez Pineda, and Mazariegos are detained at the Hudson County Correctional Facility (“Hudson County Jail”). Petition ¶¶ 5, 7, 11. Barrera Carrerro, Hernandez Balbuena, Legall, Martinez, and Menendez are detained at the Bergen County Correctional Facility (“Bergen County Jail”). *Id.* ¶¶ 6, 8, 9, 10, 12. Pena and Picazo Nicolas are detained at the Essex County Correctional Facility (“Essex County Jail”). *Id.* ¶¶ 13–14.<sup>1</sup>

Each Petitioner suffers from chronic medical conditions, and faces an imminent risk of death or serious injury in immigration detention if exposed to COVID-19. Basank is 54 years old and has a lengthy history of smoking. *Id.* ¶ 5. Barrera Carrerro, age 39, has underlying

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<sup>1</sup> During oral argument, Respondents represented to the Court that five Petitioners—Hernandez Balbuena, Legall, Menendez, Basank, and Benitez Pineda—are expected to be released today. However, because Petitioners are not yet released, and because counsel for Petitioners indicated, and Respondents did not dispute, that ICE may take as long as a day to complete the release process, the Court enters the TRO as to all Petitioners directing their immediate release today without fail.

health conditions, including obesity, respiratory problems, a history of gastrointestinal problems, and colorectal bleeding. *Id.* ¶ 6. Benitez Pineda is 44, with pulmonary issues and a history of hospitalization for severe pneumonia. *Id.* ¶ 7. Hernandez Balbuena suffers from diabetes and diabetes-related complications. *Id.* ¶ 8. Legall is 33 years old, and suffers from respiratory problems, including asthma. *Id.* ¶ 9. Martinez, age 56, suffers from severe heart disease, and has a history of hospitalization for congestive heart failure, severe aortic valvular insufficiency, and acute systolic failure, requiring immediate heart valve replacement surgery. *Id.* ¶ 10. Mazariegos is 44, and suffers from high blood pressure and pre-diabetes. *Id.* ¶ 11. Menendez is 31 years old and suffers from chronic asthma. *Id.* ¶ 12. At 36, Pena is asthmatic and has chronic obstructive pulmonary disease (“COPD”), which require inhalers and other medical treatment. *Id.* ¶ 13. Picazo Nicolas, age 40, suffers from Type II diabetes and morbid obesity. *Id.* ¶ 14.

On March 16, 2020, Hannah McCrea, an attorney with Brooklyn Defender Services, emailed Assistant United States Attorney Michael Byars, requesting that ICE release particularly vulnerable individuals, including Basank, Legall, Martinez, and Picazo Nicolas. Harper Decl. ¶ 2, ECF No. 6-1. On March 18, 2020, AUSA Byars responded that he did “not have a timeframe for ICE’s response.” *Id.* ¶ 3. On March 24, 2020, Alexandra Lampert, also a lawyer with Brooklyn Defender Services, emailed Byars to request the release of additional individuals identified as particularly vulnerable, including Barrera Carrerro, Benitez Pineda, Hernandez Balbuena, Mazariegos, Menendez, and Pena. *Id.* ¶ 4. On March 25, 2020, Lampert again emailed Byars and informed him of Petitioners’ intent to seek a temporary restraining order in the Southern District of New York, with the amended petition attached, thus putting Respondents on notice of Petitioners’ serious medical conditions and their request for injunctive relief. *Id.* ¶¶ 5, 7.

At 12:30 p.m. today, the Court held a telephonic hearing on Petitioners' request for a TRO.

## DISCUSSION

### I. Legal Standard

“A plaintiff seeking a temporary restraining order must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Natera, Inc. v. Bio-Reference Labs., Inc.*, No. 16 Civ. 9514, 2016 WL 7192106, at \*2 (S.D.N.Y. Dec. 10, 2016) (internal quotation marks, citation, and alteration omitted).

“It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction.” *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008) (collecting cases). “The showing of irreparable harm is perhaps the single most important prerequisite for a preliminary injunction.” *CF 135 Flat LLC v. Triadou SPY N.A.*, No. 15 Civ. 5345, 2016 WL 2349111, at \*1 (S.D.N.Y. May 3, 2016) (internal quotation marks, citation, and alteration omitted). Under this prong, the movant “must show that the injury it will suffer is likely and imminent, not remote or speculative, and that such injury is not capable of being fully remedied by money damages.” *NAACP v. Town of E. Haven*, 70 F.3d 219, 224 (2d Cir. 1995). To satisfy this requirement, a movant must demonstrate “that he would suffer irreparable harm if the TRO does not issue.” *Andino*, 555 F. Supp. 2d at 419. “The district court has wide discretion in determining whether to grant a preliminary injunction.” *Almontaser v. N.Y.C. Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (internal quotation marks and citation omitted) (per curiam).

## II. Analysis

### A. Irreparable Harm

In the Second Circuit, a “showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citations omitted). That harm must be “actual and imminent” rather than speculative. *Id.*

Petitioners have shown irreparable injury by establishing the risk of harm to their health and to their constitutional rights.

#### 1. Risk of Death

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. Petition ¶ 26. At that time, there were more than 118,000 cases in 114 countries, and 4,291 people had died. *Id.* ¶ 27. Merely two weeks later, there have been at least 458,927 cases identified in 172 countries and at least 20,807 people have died. *Id.* New York and its surrounding areas have become one of the global epicenters of the outbreak. *Id.* ¶ 35. Petitioners are held at detention facilities located in northern New Jersey. *See id.* ¶¶ 5–14.

As of March 26, 2020, New Jersey has 4,407 confirmed cases of COVID-19—the second highest number of reported cases by any state after New York. Niko Kommenda and Pablo Gutierrez, *Coronavirus map of the US: latest cases state by state*, The Guardian (Mar. 26, 2020), <https://www.theguardian.com/world/ng-interactive/2020/mar/26/coronavirus-map-of-the-us-latest-cases-state-by-state>. New Jersey also has the fourth most COVID-19 related deaths in the country. *Id.* The three counties where the jails are located—Bergen, Essex, and Hudson counties—comprise one-third of the confirmed cases of COVID-19 in New Jersey, with Bergen County reporting 819 positive results, Essex reporting 381 positives, and Hudson 260. Petition

¶ 36. The jails are no exceptions. Each of the jails where a Petitioner is being housed has reported confirmed cases of COVID-19. *Id.* ¶ 41. This includes two detainees and one correctional officer in the Hudson County Jail; one detainee at the Bergen County Jail; and a “superior officer” at the Essex County Jail. *Id.*

The nature of detention facilities makes exposure and spread of the virus particularly harmful. Jaimie Meyer, M.D., M.S., who has worked extensively on infectious disease treatment and prevention in the context of jails and prisons, recently submitted a declaration in this district noting that the risk of COVID-19 to people held in New York-area detention centers, including the Hudson, Bergen, and Essex County Jails, “is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” Meyer Decl. ¶ 7, *Velesaca v. Wolf*, 20 Civ. 1803 (S.D.N.Y. Feb. 28, 2020), ECF No. 42.

Moreover, medical doctors, including two medical experts for the Department of Homeland Security, have warned of a “tinderbox scenario” as COVID-19 spreads to immigration detention centers and the resulting “imminent risk to the health and safety of immigrant detainees” and the public. Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>. “It will be nearly impossible to prevent widespread infections inside the Hudson, Bergen, and Essex County jails now that the virus is in the facilities because detainees live, sleep, and use the bathroom in close proximity with others, and because ‘[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.’” Petition ¶ 47 (internal quotation marks and citation omitted).

Petitioners face serious risks to their health in their confinement. Each has underlying illnesses, including asthma, diabetes, heart disease, hypertension, obesity, and respiratory

problems including COPD. *Id.* ¶¶ 5–14. The Court takes judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality. *People at Risk for Serious Illness from COVID-19*, Centers for Disease Control (Mar. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (“Older people and people of all ages with severe underlying health conditions—like heart disease, lung disease and diabetes, for example—seem to be at higher risk of developing serious COVID-19 illness.”); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, Centers for Disease Control (Mar. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html> (listing, among other medical diagnoses, “moderate to severe asthma,” “heart disease,” “obesity,” and “diabetes” as conditions that trigger higher risk of severe illness from COVID-19); *see* Fed. R. Evid. 201(b) (“The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”); *Brickey v. Superintendent, Franklin Corr. Facility*, No. 10 Civ. 085, 2011 WL 868148, at \*2 n.3 (N.D.N.Y. Feb. 17, 2011) (taking judicial notice of the meaning and symptoms of the condition sciatica), *report and recommendation adopted*, 2011 WL 868087 (N.D.N.Y. Mar. 10, 2011); *Lin v. Metro. Life Ins. Co.*, No. 07 Civ. 03218, 2010 WL 668817, at \*1 (S.D.N.Y. Feb. 25, 2010) (“In its decision, the Court took judicial notice of certain medical background information about Hepatitis B.”).

A number of courts in this district and elsewhere have recognized the threat that COVID-19 poses to individuals held in jails and other detention facilities. *See United States v. Stephens*, No. 15 Cr. 95, 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (“[I]nmates may be at a

heightened risk of contracting COVID-19 should an outbreak develop.”) (collecting authorities); *United States v. Garlock*, 18 Cr. 418, 2020 WL 1439980, at \*1 (N.D. Cal. Mar. 25, 2020) (“By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. The chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual.” (citations omitted)); *see also* Letter from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020), <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333> (“Because of the high risk of transmittal of COVID-19, not only to prisoners within correctional facilities but staff and defense attorneys as well, we ask that you review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for nonviolent offenses. . . . Due to the confines of [correctional] facilities, it will be virtually impossible to contain the spread of the virus.”). Indeed, at least one court has ordered the release on bail of a non-citizen in immigration detention on the ground that detention conditions have been rendered unsafe by COVID-19. *Calderon Jimenez v. Wolf*, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020), ECF No. 507. Addressing the situation in New Jersey specifically, the New Jersey Supreme Court has held that “reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19” in light of “the profound risk posed to people in correctional facilities arising from the spread of COVID-19,” and has ordered the release of many individuals serving sentences in New Jersey

county jails. *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J. Mar. 22, 2020).

Courts have also recognized this health risk to be particularly acute—and of constitutional significance—for inmates who are elderly or have underlying illnesses. *See United States v. Martin*, No. 19 Cr. 140-13, 2020 WL 1274857, at \*2 (D. Md. Mar. 17, 2020) (“[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness.”). At least one court has ordered the release on bail of an inmate facing extradition on the basis of the risk to his health the pandemic poses. *Matter of Extradition of Toledo Manrique*, No. 19 MJ 71055, 2020 WL 1307109, at \*1 (N.D. Cal. Mar. 19, 2020) (“These are extraordinary times. The novel coronavirus that began in Wuhan, China, is now a pandemic. The nine counties in the San Francisco Bay Area have imposed shelter-in-place orders in an effort to slow the spread of the contagion. This Court has temporarily halted jury trials, even in criminal cases, and barred the public from courthouses. Against this background, Alejandro Toledo has moved for release, arguing that at 74 years old he is at risk of serious illness or death if he remains in custody. The Court is persuaded. The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.”).

The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO. *See Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (upholding finding of irreparable injury “premised . . . upon [the district court’s] finding that [plaintiff] was subject to risk of injury,

infection, and humiliation”); *Mayer v. Wing*, 922 F. Supp. 902, 909 (S.D.N.Y. 1996) (“[T]he deprivation of life-sustaining medical services . . . certainly constitutes irreparable harm.”).

## 2. Constitutional Violations

Second, Petitioners have also shown irreparable injury because, as discussed below, they face a violation of their constitutional rights. In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g., Connecticut Dep’t of Env’tl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (“[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.” (internal quotation marks and citations omitted)); *Statharos v. New York City Taxi & Limousine Comm’n*, 198 F.3d 317, 322 (2d Cir. 1999) (“Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.”); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that “it is the alleged violation of a constitutional right that triggers a finding of irreparable harm” and a substantial likelihood of success on the merits of a constitutional violation is not necessary); *Sajous v. Decker*, No. 18 Civ. 2447, 2018 WL 2357266, at \*12 (S.D.N.Y. May 23, 2018) (finding that immigration detainee established irreparable injury by alleging that prolonged immigration detention violated his constitutional due process rights).

The Court finds, therefore, that Petitioners have established the threat of irreparable harm absent the TRO.

### B. Likelihood of Success on the Merits

The Court concludes that Petitioners have met their burden of showing a likelihood of success on the merits. Petitioners argue that their continued confinement in ICE detention centers where COVID-19 is present and without adequate protection for their health violates their due process rights. TRO at 8. The Court agrees.

The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. The protection applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). An application for habeas corpus under 28 U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing. *See Roba v. United States*, 604 F.2d 215, 218–19 (2d Cir. 1979) (allowing a § 2241 application to challenge an inmate’s “transfer while seriously ill” where that transfer posed a risk of fatal heart failure).

Immigration detainees can establish a due process violation for unconstitutional conditions of confinement by showing that a government official “knew, or should have known” of a condition that “posed an excessive risk to health,” and failed to take appropriate action. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) (“Deliberate indifference . . . can be established by either a subjective or objective standard: A plaintiff can prove deliberate indifference by showing that the defendant official recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to the plaintiff’s health or safety.” (internal quotation marks, citation, and alterations omitted)). The risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious.<sup>2</sup> It can no longer be denied that Petitioners, who

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<sup>2</sup> Other courts have recognized the heightened risk to detainees of contracting COVID-19. *See, e.g., Xochihua-Jaimes v. Barr*, 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020) (unpublished) (“In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that [p]etitioner be immediately released from detention . . . .”); *Stephens*, 2020 WL 1295155, at \*2 (ordering “conditions of 24-hour home incarceration and electronic location monitoring”); Chris Villani, *Releasing ICE Detainee, Judge Says Jail No Safer Than Court*, Law360, March 25, 2020 (“We are living in the midst of a coronavirus pandemic, some infected people die, not all, but some infected people die,” U.S. District

suffer from underlying illnesses, are caught in the midst of a rapidly-unfolding public health crisis. The Supreme Court has recognized that government authorities may be deemed “deliberately indifferent to an inmate’s current health problems” where authorities “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Petitioners need not demonstrate that “they actually suffered from serious injuries” to show a due process violation. *Darnell*, 849 F.3d at 31; *see Helling*, 509 U.S. at 33. Instead, showing that the conditions of confinement “pose an unreasonable risk of serious damage to their future health” is sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35) (alteration omitted).

Respondents have exhibited, and continue to exhibit, deliberate indifference to Petitioners’ medical needs. The spread of COVID-19 is measured in a matter of a single day—not weeks, months, or years—and Respondents appear to ignore this condition of confinement that will likely cause imminent, life-threatening illness. At oral argument, Respondents represented that ICE and the detention facilities in which Petitioners are housed are taking certain measures to prevent the spread of the virus: screening detainees upon intake for risk factors, isolating detainees who report symptoms, conducting video court appearances with only one detainee in the room at a time, providing soap and hand sanitizer to inmates, and increasing the frequency and intensity of cleaning jail facilities.

These measures are patently insufficient to protect Petitioners. At today’s hearing, Respondents could not represent that the detention facilities were in a position to allow inmates

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Judge Wolf said. “Being in a jail enhances risk. Social distancing is difficult or impossible, washing hands repeatedly may be difficult. There is a genuine risk this will spread throughout the jail.”).

to remain six feet apart from one another, as recommended by the Centers for Disease Control and Prevention (“CDC”). *See How to Protect Yourself*, Centers for Disease Control (Mar. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>. Nor could Respondents provide the Court with any information about steps taken to protect high-risk detainees like Petitioners. And though Respondents represented that the detention facilities are below their full capacity, the appropriate capacity of a jail during a pandemic obviously differs enormously from its appropriate capacity under ordinary circumstances. Confining vulnerable individuals such as Petitioners without enforcement of requisite social distancing and without specific measures to protect their delicate health “pose[s] an unreasonable risk of serious damage to [their] future health,” *Phelps*, 308 F.3d at 185 (internal quotation marks and citation omitted), and demonstrates deliberate indifference.

The Court holds, therefore, that Petitioners are likely to succeed on the merits of their due process claim that Respondents knew or should have known that Petitioners’ conditions of confinement pose excessive risks to their health.<sup>3</sup>

### C. Balance of Equities and Public Interest

The equities and public interest weigh heavily in Petitioners’ favor. First, Petitioners face irreparable injury—to their constitutional rights and to their health.

Second, the potential harm to Respondents is limited. At today’s hearing, Respondents were unable to identify a single specific reason for Petitioners’ continued detention. And the Court finds that there is none. Petitioners’ counsel committed to ensuring the continued appearance of Petitioners at immigration hearings. And, of course, Petitioners’ failure to appear at those hearings would carry grave consequences for their respective cases. The Court finds that

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<sup>3</sup> The Court does not reach Petitioners’ additional argument that they are likely to succeed on the merits of the claim that their due process rights were violated because their current conditions of confinement are punitive. TRO at 8–9.

those incentives are sufficient to safeguard Respondents' interest in Petitioners' in-person participation in future immigration court proceedings.

At oral argument, Respondents raised the fact that Petitioners Martinez and Pena are currently mandatorily detained pursuant to 18 U.S.C. § 1226(c).<sup>4</sup> However, courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c). *See Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases). Thus, Respondents have failed to justify Petitioners' continued detention in unsafe conditions.

Finally, the public interest favors Petitioners' release. Petitioners are confined for civil violations of the immigration laws. In the highly unusual circumstances posed by the COVID-19 crisis, the continued detention of aging or ill civil detainees does not serve the public's interest. *See* Declaration of Dr. Homer Venters ¶ 12, *Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that "the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); Declaration of Dr. Carlos Franco-Paredes, *id.* at ECF No. 81-12 at 1 ("Immigration detention centers in the U.S. are tinderboxes for the transmission of highly transmissible infectious pathogens including the SARS-CoV-2, which causes COVID-19. Given the large population density of immigration detention centers and the ease of transmission of this viral pathogen, the attack rate inside these centers will take exponential proportions, consuming significant medical and financial resources."); *Urgent action needed to prevent COVID-19 "rampaging through places of detention"* – *Bachelet*, UNHCR (Mar. 25, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=e> (United Nations High Commissioner for Human Rights urging that detention of people in jails

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<sup>4</sup> As represented by Petitioners' counsel, Martinez's § 1226(c) detention was triggered by his conviction for controlled substances trafficking in 2014, an offense for which he served no term of imprisonment. Pena's § 1226(c) detention was triggered by misdemeanor marijuana convictions from 2002.

“should be a measure of last resort, particularly during this crisis”). To the contrary, public health and safety are served best by rapidly decreasing the number of individuals detained in confined, unsafe conditions. *See, e.g., Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”).

### CONCLUSION

For the reasons stated above, the TRO is GRANTED. Respondents, and the Hudson, Bergen, and Essex County Correctional Facilities are ORDERED to **immediately** release Petitioners today on their own recognizance without fail. Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings.

The TRO will expire on **April 9, 2020, at 6:30 p.m.** No later than **April 2, 2020, at 12:00 p.m.**, Respondents must show cause why the TRO should not be converted to a preliminary injunction. Petitioners may file a response no later than **April 7, 2020, at 12:00 p.m.**

SO ORDERED.

Dated: March 26, 2020, at 6:30 p.m.  
New York, New York



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ANALISA TORRES  
United States District Judge



1 ["BICE"] on May 23, 2019, and, then placed into removal proceedings, with the  
 2 service of a Notice to Appear at the time of his arrest. Hernandez's removal  
 3 proceedings are pursuant to the Immigration and Nationality Act ["INA"] §  
 4 212(a)(6)(A)(i)(I), for being an alien present in the United States without being admitted  
 5 or paroled.

6 Adelanto is a private, for-profit immigration detention facility operated by Geo  
 7 Group, Inc. Adelanto has the capacity to hold, under normal situations, well over  
 8 1,000 detainees through a contract with BICE. Over the years, and as recently as 2018,  
 9 DHS's Office of the Inspector General had, repeatedly, found that significant and  
 10 various health and safety risks existed at Adelanto.

11 Hernandez, a citizen of Mexico, has, apparently, resided in the United States for  
 12 almost thirty years. His life partner is Maria Victoria de Ortiz, a lawful permanent  
 13 resident of the United States who resides in Altadena, California. Together, they have  
 14 a 12-year-old daughter, who is a United States citizen.

15 Hernandez has a history of various criminal charges and convictions. Of  
 16 significant note is that all of Hernandez's convictions were for infractions or  
 17 misdemeanors. He has never been convicted of a felony. Hernandez has been  
 18 convicted of the following:

Date	Offense	Sentence
1997	Hit and Run with Property Damage, Cal. Veh. Code § 20002(a)	40 days in jail and 36 months probation
2014	Theft, Cal. Penal Code § 484(a)	1 day in jail and 36 months probation
2016	Driving Without a Valid License, Cal. Veh. Code § 12500(a)	Fine
2017	Possession of a Controlled Substance, Cal. Health and Safety Code § 11377	Probation extension

2017	Petty Theft, Cal. Penal Code § 490.2	60 days in jail and 36 months probation
2017	Trespassing, Cal. Penal Code § 602(m)	4 days in jail and 36 months probation
2018	Possession of a Controlled Substance, Cal. Health and Safety Code § 11377	30 days in jail and 36 months probation
2019	Possession of Burglary Tools, Cal. Penal Code § 466; Shoplifting, Cal. Penal Code § 602(m)459.5; and Driving Without a License, Cal. Veh. Code § 12500(a)	36 months probation

In response to Hernandez’s May 15, 2019, convictions in Glendale, California, BICE officers arrested him on May 23, 2019. Around June 12, 2019, Hernandez had his first bond hearing, where bond was denied after an immigration judge found that he was a flight risk due to his “multiple failures to appear in the Superior Court of California and his lack of ties to the community. The immigration judge, also, found that Hernandez was a mandatory detainee under INA § 236(c), which is codified as 8 U.S.C. § 1226(c).

In reviewing Hernandez’s rap sheet, provided by the Government, this Court noted that Hernandez was, indeed, charged on four separate occasions – in 1997, 2003, 2006 and 2017 – with failing to appear in violation of Cal. Veh. Code § 40508(A). But, the Court, also, noted that each of those four charges were, indeed, dismissed, with one dismissed, specifically, in the furtherance of justice. So, it is noteworthy that immigration judges considered dismissed charges as a basis for the conclusion that Hernandez was a flight risk. It is, also, noteworthy that an immigration judge concluded that Hernandez had a lack of ties to the community even though his life partner and daughter reside in Altadena, California. But, those issues are not directly before this Court.

Regardless, on November 27, 2019, an immigration judge denied Hernandez’s

1 applications for asylum, withholding of removal and protection under the Convention  
2 against Torture. On December 2, 2019, Hernandez had a *Rodriguez* bond hearing, at  
3 which bond was denied because the immigration judge lacked jurisdiction. On  
4 December 20, 2019, Hernandez filed an appeal with the Board of Immigration Appeals  
5 ["BIA"]. On January 14, 2020, an immigration judge denied Hernandez's request for  
6 a change in custody, finding that he was a flight risk who had a removal order, and,  
7 also, finding that Hernandez had multiple failures to appear. Hernandez's appeal with  
8 the BIA remains pending.

9 On March 4, 2020, the State of California declared a state of emergency in  
10 response to the coronavirus and the resulting COVID-19 disease, which attacks the  
11 respiratory system, thereby making Hernandez particularly vulnerable given his history  
12 of asthma. On March 10, 2020, San Bernardino County followed suit and declared a  
13 state of emergency. On March 11, 2020, the World Health Organization ["WHO"]  
14 declared COVID-19 to be a global pandemic. On March 13, 2020, President Donald  
15 J. Trump formally acknowledged and declared a national emergency in response to  
16 WHO's pandemic declaration.

17 On March 18, 2020, BICE announced that "[t]o ensure the welfare and safety of  
18 the general public as well as officers and agents in light of the ongoing COVID-19  
19 pandemic response, [it] will temporarily adjust its enforcement posture beginning today  
20 ... [and that its] highest priorities are to promote life-saving and public safety  
21 activities." Further, BICE stated that it would focus enforcement "on public safety risks  
22 and individuals subject to mandatory detention based on criminal grounds [, and for  
23 those people who do not fall into those categories, agents] will exercise discretion to  
24 delay enforcement actions until after the crisis or utilize alternatives to detention, as  
25 appropriate."

26 According to the United States Centers for Disease Control and Prevention, the  
27 coronavirus is spread mainly through person-to-person contact. More specifically, the  
28 coronavirus is spread between people who are in close contact – within about 6 feet –

1 with one another through respiratory droplets produced when an infected person coughs  
2 or sneezes. The droplets can land in the mouths or noses, or can be inhaled into the  
3 lungs, of people who are within about 6 feet of the infected person. Moreover, studies  
4 have established that the coronavirus can survive up to three days on various surfaces.

5 COVID-19 is highly contagious and has a mortality rate ten times greater than  
6 influenza. Most troublesome is the fact that people infected with the coronavirus can  
7 be asymptomatic during the two to fourteen day COVID-19 incubation period. During  
8 that asymptomatic incubation period, infected people are, unknowingly, capable of  
9 spreading the coronavirus. Despite early reports, no age group is safe from COVID-  
10 19. While older people with pre-existing conditions are the most vulnerable to COVID-  
11 19-related mortality, young people without preexisting conditions have, also,  
12 succumbed to COVID-19. There is no specific treatment, vaccine or cure for COVID-  
13 19.

14 Because of the highly contagious nature of the coronavirus and the, relatively  
15 high, mortality rate of COVID-19, the disease can spread uncontrollably with  
16 devastating results in a crowded, closed facility, such as an immigration detention  
17 center.

18 The Court will take judicial notice of the following facts, as set forth in the  
19 temporary retraining order issued by this Court on March 27, 2020, in *Castillo v. Barr*,  
20 CV 20-00605 TJH. At Adelanto, a holding area can contain 60 to 70 detainees, with  
21 a large common area and dormitory-type sleeping rooms housing four or six detainees  
22 with shared sinks, toilets and showers. Guards regularly rotate through the various  
23 holding areas several times a day. At meal times – three times a day – the 60 to 70  
24 detainees in each holding area line up together, sometimes only inches apart, in the  
25 cafeteria. The guards, detainees and cafeteria workers do not regularly wear gloves or  
26 masks to prevent the spread of the coronavirus. While detainees have access to gloves,  
27 there is no requirement that they wear them. Detainees do not have access to masks  
28 or hand sanitizer – though thorough hand washing could be more effective than hand

1 sanitizers at preventing the spread of the coronavirus.

2 Last week, the first BICE detainee was confirmed to have been infected with  
3 COVID-19 in New Jersey at the Bergen County Jail, a BICE detention facility. The  
4 week before last, a correctional officer at the Bergen County Jail was, also, confirmed  
5 to have been infected. As of the date of this order, two additional ICE detainees at the  
6 Bergen County Jail were confirmed to have been infected.

7 On March 26, 2020, Judge Analisa Torres of the United States District Court for  
8 the Southern District of New York issued an order releasing certain immigration  
9 detainees, stating the following:

10 The nature of detention facilities makes exposure and spread of the  
11 virus particularly harmful. Jaimie Meyer M.D., M.S., who has worked  
12 extensively on infectious diseases treatment and prevention in the context  
13 of jails and prisons, recently submitted a declaration in this district noting  
14 that the risk of COVID-19 to people held in New York-area detention  
15 centers, including the Hudson, Bergen County, and Essex County jails, “is  
16 significantly higher than in the community, both in terms of risk of  
17 transmission, exposure, and harm to individuals who become infected.”  
18 Meyer Decl. ¶ 7, *Velesaca v. Wolf*, 20 Civ. 1803 (S.D.N.Y. Feb. 28,  
19 2020), ECF No. 42.

20 Moreover, medical doctors, including two medical experts for the  
21 Department of Homeland Security, have warned of a “tinderbox scenario”  
22 as COVID-19 spreads to immigration detention centers and the resulting  
23 “imminent risk to the health and safety of immigrant detainees” and the  
24 public. Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if*  
25 *Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020),  
26 [https://www.cnn.com/2020/03/20/health/doctors-ice-detention-](https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html)  
27 [coronavirus/index.html](https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html). “It will be nearly impossible to prevent  
28 widespread infections inside the Hudson, Bergen, and Essex County jails

1 now that the virus is in the facilities because detainees live, sleep, and use  
2 the bathroom in close proximity with others, and because ‘[b]ehind bars,  
3 some of the most basic disease prevention measures are against the rules  
4 or simply impossible.’” Petition ¶ 47 (internal quotation marks and citation  
5 omitted).

6 *Basank, et al., v. Decker, et al.*, 20 Civ. 2518 (S.D.N.Y., Feb. 28, 2020), ECF No.  
7 11.

8 On March 23, 2020, the Ninth Circuit ordered, *sua sponte* and without further  
9 explanation, the release of an immigration detainee “[i]n light of the rapidly escalating  
10 public health crisis, which public health authorities predict will especially impact  
11 immigration detention centers.” *Xochihua-Jaimes v. Barr*, 2020 WL 1429877, No. 18-  
12 71460 (9th Cir. Mar. 23, 2020).

13 On March 23, 2020, Hernandez filed a petition for a writ of *habeas corpus*,  
14 pursuant to 28 U.S.C. § 2241. Hernandez’s petition sets forth one claim – in light of  
15 the recent COVID-19 pandemic, the conditions of his confinement are, now,  
16 unconstitutional.

17 Hernandez’s *habeas* petition and the relief it seeks from this Court are not barred  
18 by the fact that he might be subject to mandatory detention pursuant to INA § 236(c).  
19 *See Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011). While the INA does restrict  
20 jurisdiction in federal courts for certain claims, it does not restrict *habeas* jurisdiction  
21 for petitions that raise constitutional claims. *See Singh*, 638 F.3d at 1202.

22 Hernandez, now, moves for a temporary restraining order for his immediate  
23 release from Adelanto.

24 Hernandez is entitled to a temporary restraining order if he shows: (1) A  
25 likelihood of success on the merits; (2) That he is likely to suffer irreparable harm in  
26 the absence of relief; (3) The balance of equities tip in his favor; and (4) An injunction  
27 is in the public’s interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20  
28 (2008). Under the Ninth Circuit’s sliding scale approach, a stronger showing of one

1 element may offset a weaker showing of another. *See Pimentel v. Dreyfus*, 670 F.3d  
2 1096, 1105 (9th Cir. 2012). Accordingly, Hernandez is entitled to a temporary  
3 restraining order if “serious questions going to the merits [are] raised and the balance  
4 of hardships tips sharply in [his] favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d  
5 1127, 1131 (9th Cir. 2011).

6 When the Government detains a person for the violation of an immigration law,  
7 the person is a civil detainee, even if he has a prior criminal conviction. *See Zadvydas*  
8 *v. Davis*, 533 U.S. 678, 690 (2001). As a civil detainee, Hernandez is entitled to more  
9 considerate treatment than criminal detainees, whose conditions of confinement are  
10 designed to punish. *See Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982).  
11 Moreover, under the Fifth Amendment’s Due Process Clause, a civil detainee cannot  
12 be subjected to conditions that amount to punishment. *See King v. Cty. of L.A.*, 885  
13 F.3d 548, 556-557 (9th Cir. 2018).

14 When the Government takes a person into custody and detains him against his  
15 will, the Constitution imposes upon the Government a duty to assume responsibility for  
16 that detainee’s safety and general well being. *See Helling v. McKinney*, 509 U.S. 25,  
17 32 (1993). Under the Eighth Amendment, the Government must provide criminal  
18 detainees with basic human needs, including reasonable safety. *Helling*, 509 U.S. at  
19 32. The Government violates the Eighth Amendment if it confines a criminal detainee  
20 in unsafe conditions. *See Helling*, 509 U.S. at 33. Moreover, the Government may not  
21 “ignore a condition of confinement that is sure or very likely to cause serious illness.”  
22 *See Helling*, 509 U.S. at 32.

23 A civil detainee’s constitutional rights are violated if a condition of his  
24 confinement places him at substantial risk of suffering serious harm, such as the harm  
25 caused by a pandemic. *See Smith v. Wash.*, 781 F. App’x. 595, 588 (9th Cir. 2019).  
26 At a minimum, here, the Government owes a duty to Hernandez, as a civil immigration  
27 detainee, to reasonably abate known risks. *See Castro v. Cty. of Los Angeles*, 833 F.3d  
28 1060, 1071 (9th Cir. 2016). Inadequate health and safety measures at a detention center

1 cause cognizable harm to every detainee at that center. *See Parsons v. Ryan*, 754 F.3d  
2 657, 679 (9th Cir. 2014).

3 Here, Hernandez argued that the conditions at Adelanto expose him to a  
4 substantial risk of suffering serious harm – increasing his exposure to or contracting  
5 COVID-19. When the Government detains a person, thereby taking custody of that  
6 person, it creates a special relationship wherein the Government assumes responsibility  
7 for that detainee’s safety and well-being. *See, e.g., Henry A. v. Willden*, 678 F.3d 991,  
8 998 (9th Cir. 2012). If the Government fails to provide for a detainee’s basic human  
9 needs, including medical care and reasonable safety, the Due Process Clause is violated.  
10 *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). Indeed,  
11 the Due Process Clause mandates that civil immigration detainees are entitled to more  
12 than minimal human necessities. *See Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir.  
13 2004). At a minimum, here, the Government owes a duty to Hernandez, as a civil  
14 immigration detainee, to reasonably abate known risks. *See Castro v. Cty. of Los*  
15 *Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). Inadequate health and safety measures  
16 at a detention center cause cognizable harm to every detainee at that center. *See*  
17 *Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014).

18 In its opposition brief, the Government set forth the United States Attorney  
19 General’s discretionary right to detain an alien in removal proceedings prior to a final  
20 order of removal. *See* 8 U.S.C. § 1226. Indeed, the Attorney General has the  
21 discretion to either: (1) Detain the person without bond or (2) Release the person on a  
22 bond of at least \$1,500.00 or on conditional parole. 8 U.S.C. § 1226(a). In making  
23 the initial bond determination, a BICE officer must assesses whether the person has  
24 “demonstrate[d]” that “release would not pose a danger to property or persons, and that  
25 the alien is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). If the  
26 BICE officer determines that release, with or without bond, is not appropriate, then the  
27 person may appeal to an Immigration Judge. 8 C.F.R. §§ 236.1(d)(1), 1003.19,  
28 1236.1(d)(1). The Immigration Judge’s decision, then, would be appealable to the

1 Board of Immigration Appeals. 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38.

2 However, because Hernandez, here, has asserted a claim for violations of his  
3 Fifth Amendment substantive due process rights, and those claims exceed the  
4 jurisdictional limits of the Immigration Court and the Board of Immigration Appeals,  
5 he need not first exhaust his administrative remedies. *Garcia-Ramirez v. Gonzales*, 423  
6 F.3d 935, 938 (9th Cir. 2005).

7 The Government argued that Hernandez lacks standing because he cannot  
8 establish that he would suffer a concrete, non-hypothetical injury absent a temporary  
9 restraining order in that his likelihood of contracting COVID-19 is speculative. *See*  
10 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

11 However, it is clear that “[a] remedy for unsafe conditions need not await a tragic  
12 event.” *Helling*, 509 U.S. at 33. The Government cannot be “deliberately indifferent  
13 to the exposure of [prisoners] to a serious, communicable disease on the ground that the  
14 complaining [prisoner] shows no serious current symptoms.” *Helling*, 509 U.S. at 33.  
15 “That the Eighth Amendment protects against future harm to inmates is not a novel  
16 proposition.” *Helling*, 509 U.S. at 33. The Supreme Court clearly stated that “... the  
17 Eighth Amendment protects [prisoners] against sufficiently imminent dangers as well  
18 as current unnecessary and wanton infliction of pain and suffering...” *Helling*, 509  
19 U.S. at 33. Indeed, the Court concluded that where prisoners in punitive isolation were  
20 crowded into cells and some of them had infectious maladies, “... the Eighth  
21 Amendment required a remedy, even though it was not alleged that the likely harm  
22 would occur immediately and even though the possible infection might not affect all of  
23 those exposed.” *Helling*, 509 U.S. at 33. Civil detainees are entitled to greater liberty  
24 protections than individuals detained under criminal processes. *See Jones*, 393 F.3d at  
25 932.

26 In its *amicus* brief filed in *Helling*, the Government stated that it “... recognizes  
27 that there may be situations in which exposure to toxic or similar substances would  
28 present a risk of sufficient likelihood or magnitude – and in which there is a sufficiently

1 broad consensus that exposure of *anyone* to the substance should therefore be prevented  
2 – that the [Eighth] [A]mendment’s protection would be available even though the effects  
3 of exposure might not be manifested for some time.” *Helling*, 509 U.S. at 34. The  
4 Government, here, cannot say, with any degree of certainty, that no one – staff or  
5 detainee – at Adelanto has not been, or will not be, infected with the coronavirus. The  
6 science is well established – infected, asymptomatic carriers of the coronavirus are  
7 highly contagious. Moreover, Hernandez, presently, is suffering from a condition of  
8 confinement that takes away, *inter alia*, his ability to socially distance. The  
9 Government cannot be deliberately indifferent to Hernandez’s potential exposure to a  
10 serious, communicable disease on the ground that he is not, now, infected or showing  
11 current symptoms. *See Helling*, 509 U.S. at 32.

12 It is “cruel and unusual punishment to hold convicted criminals in unsafe  
13 conditions.” *Helling*, 509 U.S. at 33. The Eighth Amendment is violated when a  
14 condition of a criminal detainee’s confinement puts him at substantial risk of suffering  
15 serious harm and that the condition causes suffering inconsistent with contemporary  
16 standards of human decency. *See Smith v. Wash.*, 781 F. App’x. 595, 597-598 (9th  
17 Cir. 2019). However, a civil detainee seeking to establish that the conditions of his  
18 confinement are unconstitutional need only show that his conditions of confinement  
19 “put [him] at substantial risk of suffering serious harm.” *See Smith*, 781 F. App’x.  
20 597-598. Here, BICE cannot be deliberately indifferent to the potential exposure of  
21 civil detainees to a serious, communicable disease on the ground that the complaining  
22 detainee shows no serious current symptoms, or ignore a condition of confinement that  
23 is more than very likely to cause a serious illness. *See Helling*, 509 U.S. at 32.

24 Under the Due Process Clause, a civil detainee cannot be subject to the current  
25 conditions of confinement at Adelanto. The Supreme Court has acknowledged that it  
26 has “... great difficulty agreeing that prison authorities may not be deliberately  
27 indifferent to an inmate’s current health problems but may ignore a condition of  
28 confinement that is sure or very likely to cause serious illness and needless suffering the

1 next week or month or year.” *Helling*, 509 U.S. at 33

2 The Government, here, argued that Hernandez may not challenge the conditions  
3 of his confinement through a *habeas* petition. Rather, according to the Government,  
4 he may proceed only by way of a civil claim under 42 U.S.C. § 1983, and that the only  
5 appropriate remedies under § 1983 are a judicially mandated change to the conditions  
6 of confinement and money damages. The Government’s argument is misplaced.

7 In discussing the relationship between a *habeas* petition and a § 1983 claim, the  
8 Supreme Court explained that a *habeas* petition is the appropriate avenue for a detainee  
9 to attack the validity of the fact, or length, of confinement, with a potential remedy of  
10 immediate release; whereas, a § 1983 claim is the appropriate avenue for a detainee to  
11 attack something other than the fact, or length, of confinement, with a potential remedy  
12 of a policy change and/or money damages. *See Prieser v. Rodriguez*, 441 U.S. 475,  
13 494 (1973). Typically, conditions of confinement claims are raised by criminal  
14 detainees while serving their criminal sentences. Consequently, immediate release  
15 based on the conditions of confinement would not be appropriate, as that would  
16 circumvent their criminal sentences. But, Hernandez is a civil detainee. Thus, it is  
17 appropriate for him to proceed by way of a *habeas* petition because he challenges the  
18 validity of his confinement and seeks his immediate release.

19 As the Court writes this order, the number of confirmed COVID-19 cases in the  
20 United States has already exceeded the number of confirmed cases in every other  
21 country on this planet. Indeed, all of the experts and political leaders agree that the  
22 number of confirmed cases in the United States will only increase in the days and weeks  
23 ahead. The number of cases in the United States has yet to peak. In San Bernardino  
24 County, the number of confirmed cases, there, has more than tripled over the past  
25 week.

26 The risk that Hernandez will flee is minimal given the current global pandemic,  
27 his ties to the community, and his pending appeal before the BIA. Further, Hernandez  
28 should be aware that if he is ordered released and, then, flees or violates any federal,

1 state or local criminal law, it will have a dire impact on his pending BIA appeal and all  
2 further proceedings in this case.

3 Civil detainees must be protected by the Government. Hernandez has not been  
4 protected. He is not kept at least 6 feet apart from others at all times. He has been put  
5 into a situation where he has been forced to touch surfaces touched by other detainees,  
6 such as with common sinks, toilets and showers. Moreover, the Government cannot  
7 deny the fact that the risk of infection in immigration detention facilities – and jails –  
8 is particularly high if an asymptomatic guard, or other employee, enters a facility.  
9 While social visits have been discontinued at Adelanto, the rotation of guards and other  
10 staff continues.

11 Accordingly, Hernandez has established that there is more than a mere likelihood  
12 of his success on the merits for his first claim, which is based on his Due Process  
13 rights. *See Winter*, 555 U.S. at 20.

14 Hernandez has established that he is likely to suffer irreparable harm in the  
15 absence of relief. *See Winter*, 555 U.S. at 20. It is well established that the deprivation  
16 of constitutional rights unquestionably constitutes irreparable injury. *See Hernandez v.*  
17 *Session*, 872 F.3d 976, 994 (9th Cir. 2017).

18 The balance of the equities tip sharply in his favor. Hernandez faces irreparable  
19 harm to his constitutional rights and health. Indeed, there is no harm to the  
20 Government when a court prevents the Government from engaging in unlawful  
21 practices. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

22 Finally, the emergency injunctive relief sought, here, is absolutely in the public's  
23 est interest. The public has a critical interest in preventing the further spread of the  
24 coronavirus. An outbreak at Adelanto would, further, endanger all of us – Adelanto  
25 detainees, Adelanto employees, residents of San Bernardino County, residents of the  
26 State of California, and our nation as a whole.

27 This is an unprecedented time in our nation's history, filled with uncertainty,  
28 fear, and anxiety. But in the time of a crisis, our response to those at particularly high

1 risk must be with compassion and not apathy. The Government cannot act with a  
2 callous disregard for the safety of our fellow human beings.

3  
4 Accordingly,

5  
6 **It is Ordered** that the application for a temporary restraining order be, and  
7 hereby is, **Granted**.

8  
9 **It is further Ordered** that Respondents shall, by 5:00 p.m. on April 2, 2020,  
10 release Petitioner Enrique Francisco Hernandez from custody pending further order of  
11 this Court, and subject to the following conditions of release:

- 12 1. Petitioner shall reside, and shelter in place, at the residence of Maria  
13 Victoria de Ortiz, 2765 Bula Court, Altadena, California 91001 [“the  
14 Residence”];
- 15 2. Petitioner shall be transported from the Adelanto Detention Center directly  
16 to the Residence by Maria Victoria de Ortiz;
- 17 3. Petitioner shall not leave the Residence, pending further order of the  
18 Court, except to obtain medical care;
- 19 4. Petitioner shall not violate any federal, state or local laws;
- 20 5. Petitioner shall not use or possess illegal drugs; and
- 21 6. At the discretion of DHS and/or BICE, to enforce the above restrictions,  
22 Petitioner’s whereabouts may be monitored by telephonic and/or electronic  
23 and/or GPS monitoring and/or a location verification system and/or an  
24 automated identification system. If necessary to comply with the permitted  
25 monitoring, Petitioner shall ensure the presence of a residential telephone  
26 line without devices and/or services which may interrupt operation of any  
27 monitoring equipment.

1           **It is further Ordered** that Respondents shall show cause, if they have any, as  
2 to why the Court should not issue a preliminary injunction in this case. Respondents'  
3 response, if any, to this order to show cause shall be filed by Noon on April 6, 2020.  
4 Hernandez's reply, if any, to Respondents' response shall be filed by Noon on April 9,  
5 2020. The matter will then stand submitted.

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7 Date: April 1, 2020

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10 **Terry J. Hatter, Jr.**  
11 **Senior United States District Judge**  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

AARON HOPE,	:	1:20-cv-562
<i>et al.</i> ,	:	
Petitioners-Plaintiffs,	:	
	:	
v.	:	Hon. John E. Jones III
	:	
CLAIR DOLL, <i>in his official capacity</i>	:	
<i>as Warden of York County Prison,</i>	:	
<i>et al.</i> ,	:	
Respondents-Defendants.	:	

**MEMORANDUM AND ORDER**

**April 7, 2020**

Pending before the Court is the Motion for Temporary Restraining Order and/or Preliminary Injunction filed by Petitioners-Plaintiffs Aaron Hope, Iwan Rahardja, Jesus De La Pena, Rakibu Adam, Duc Viet Lam, Yelena Mukhina, Nashom Gebretinsae, Ismail Muhammed, Glenn Weithers, Konstantin Bugarenko, Brisio Balderas-Dominguez, Viviana Ceballos, Wilders Paul, Marcos Javier Ortiz Matos, Alexander Alvarenga, Armando AVECILLA, Coswin Ricardo Murray, Edwin Luis Crisostomo Rodriguez, Eldon Bernard Briette, Dembo Sannoh, Jesus Angel Juarez Pantoja and Alger Fracois, (collectively “Petitioners”). (Doc. 5).

For the reasons that follow, the temporary restraining order shall be granted and the Respondents shall be directed to immediately release Petitioners today on their own recognizance.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioners are a diverse group of individuals from around the world who are being held in civil detention by Immigration and Customs Enforcement, (“ICE”), at York County Prison and Pike County Correctional facility, (“the Facilities”), while they await final disposition of their immigration cases.

Each Petitioner suffers from chronic medical conditions and faces an imminent risk of death or serious injury if exposed to COVID-19. Hope is 32 years old and has serious respiratory problems that have led to his hospitalization for pneumonia. He also has sleep apnea and high blood pressure. (Doc. 1, ¶ 3).

Rahardja is 51 years old and suffers from diabetes and hypertension.

(Doc. 1, ¶ 4). De La Pena is 37 years old and suffers from severe asthma and hypertension and is over-weight. (Doc. 1, ¶ 5). Adam, 34 years old, suffers from asthma and high blood pressure. (Doc. 1, ¶ 6). Viet Lam is 50 years old and suffers from diabetes and high blood pressure. *Id.* at ¶ 7. Mukhina is 35 years old and suffers from asthma, a heart murmur, and hepatitis C, and has a history of blood clots and seizures. (Doc.1, ¶ 8). Gebretnisae is 28 years old and suffers from Cn’s arthritis and nerve pain, requiring many medications. (Doc. 1, ¶ 9).

Muhammed is 69 years old and suffers from asthma, is pre-diabetic, and has recently lost a significant amount of weight. (Doc. 1, ¶ 10). Weithers is 59 years old and suffers from emphysema and chronic obstructive pulmonary

disease. (Doc. 1, ¶ 11). Bugarenko, age 49, suffers from pre-diabetes, high blood pressure, and diverticulitis, as well as debilitating pain that inhibits his ability to walk. (Doc. 1, ¶ 12). Baldarez-Domingez is 47 years old and suffers from diabetes, atrial fibrillation, and high blood pressure. (Doc. 1, ¶ 13).

Ceballos, 56 years old, suffers from high blood pressure. (Doc. 1, ¶ 14). Paul is 32 years old and suffers from traumatic brain injury, seizures, and headaches. (Doc. 1, ¶ 15).

Matos is 32 years old and suffers from diabetes. (Doc. 1, ¶ 16).

Alvargena, age 46, suffers from diabetes, high blood pressure, atrial fibrillation, high cholesterol, and partial physical disability from a prior accident. (Doc. 1, ¶ 17). Avecilla is 53 years old and suffers from diabetes. (Doc. 1, ¶ 18). Murray is 45 years old and suffers from asthma but has been unable to obtain an inhaler. (Doc. 1, ¶ 19). Rodriguez is 31 years old and suffers from asthma. (Doc. 1, ¶ 20). Briette is 46 years old and suffers from diabetes, high blood pressure, high cholesterol, depression, and anxiety. (Doc. 1, ¶ 21). Sannoh, 41 years old, suffers from diabetes requiring daily medication. (Doc. 1, ¶ 22). Pantoja is 36 years old and suffers from asthma, sleep apnea, and high blood pressure. (Doc.

1, ¶ 23). Francois is 45 years old and suffers from hypertension, pain when he urinates, and swollen feet. (Doc. 1, ¶ 24).<sup>1</sup>

Named as Respondents are: Clair Doll, Warden of York County Prison; Craig A. Lowe, Warden of Pike County Correctional Facility; Simona Flores-Lund, Field Office Director, ICE Enforcement and Removal Operations; Matthew Albence, Acting Director of ICE; and Chad Wolf, Acting Secretary of the Department of Homeland Security.

## II. DISCUSSION

We had occasion to consider the substantially same set of circumstances less than a week ago in our opinion *Thakker v. Doll*, No. 1:20-CV00480 (M.D. Pa. Mar. 31, 2020) (Jones, J.) (discussing in-depth the potential severity of COVID-19, its prevalence across the globe, and its impact upon ICE detention facilities in particular). We now begin our analysis of Petitioners' claims guided by our previous findings.

### i. Legal Standard

Courts apply one standard when considering whether to issue interim injunctive relief, regardless of whether a petitioner requests a temporary restraining order ("TRO") or preliminary injunction. *See Ellakkany v. Common Pleas Court of*

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<sup>1</sup> We have previously held that ICE detainees have the requisite standing to bring claims based upon imminent contraction of COVID-19, and that a *habeas* petition is the proper vehicle to do so. *Thakker v. Doll*, No. 1:20-CV00480, at 5-6 (M.D. Pa. Mar. 31, 2020).

*Montgomery Cnty.*, 658 Fed.Appx. 25, 27 (3d Cir. July 27, 2016) (applying one standard to a motion for both a TRO and preliminary injunction). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Apple Inc. v. Samsung Electronics Co.*, 695 F.3d 1370, 1373–74 (Fed. Cir. 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008)).

The Supreme Court has emphasized that “a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Apotex Inc. v. U.S. Food and Drug Admin.*, 508 F.Supp.2d 78, 82 (D.D.C. 2007) (“Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly.”). “Awarding preliminary relief, therefore, is only appropriate ‘upon a clear showing that the plaintiff is entitled to such relief.’” *Groupe SEC USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter*, 555 U.S. at 22).

## ii. Irreparable Harm

COVID-19 is a novel coronavirus that causes “serious, potentially permanent, damage to lung tissue, and can require extensive use of a ventilator. [20-cv-562, Doc. 3, Ex. 2]. The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. (*Id.*)” *Thakker* at 10.

Because of these potentially catastrophic complications, COVID-19 has radically transformed our everyday lives in ways previously inconceivable. Most of the county can no longer leave their homes unless absolutely necessary.<sup>2</sup> “Large portions of our economy have come to a standstill. Children have been forced to attend school remotely. Workers deemed ‘non-essential’ to our national infrastructure have been told to stay home.” *Thakker*. at 4. Indeed, the World Health Organization (“WHO”) has declared a global pandemic<sup>3</sup> in light of the

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<sup>2</sup> Sarah Mervosh, Denise Lu, and Vanessa Swales, “See Which States and Cities have Told Residents to Stay at Home,” *NEW YORK TIMES*, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last accessed April 7, 2020).

<sup>3</sup> The World Health Organization (“WHO”) officially declared COVID-19 as global pandemic on March 11, 2020. *See WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION, (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

stark realities we now face: over one million people worldwide have contracted COVID-19. Well over sixty thousand have perished as a result.<sup>4</sup>

Less than one week ago, we found that the threat of a COVID-19 outbreak in the Facilities constituted irreparable harm to substantially similar Petitioners, despite the fact that there were, at that time, *no* confirmed cases of COVID-19 in the Facilities. *Thakker*, at 7-19.<sup>5</sup> In so doing, we noted that “it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein.” *Id.* at 8 (emphasis in original).

We have, unfortunately, been proven correct in this regard. As of the time of this writing, the Pike County Correctional Facility has officially reported that four ICE detainees housed therein have tested positive for COVID-19.<sup>6</sup> Four Pike County Correctional employees have also tested positive. (Doc. 6, Ex. 3). An additional detainee at York County Prison has also tested positive. *See ICE Latest Statement*. And we can only assume that these numbers may well be much higher

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<sup>4</sup> See *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last accessed April 7, 2020).

<sup>5</sup> In *Thakker*, we considered the potential harm faced by ICE detainees in county prisons located in York, Pike, and Clinton Counties, finding that there was a high likelihood that Petitioners would face severe complications, and even death, should they contract COVID-19 in the Facilities—which we found to be a likely outcome of their continued detention. *Thakker* 7-19. Here, we again consider the likelihood of irreparable harm in two of those same facilities: those in York and Pike Counties.

<sup>6</sup> *ICE Latest Statement*, ICE GUIDANCE ON COVID-19, <https://www.ice.gov/coronavirus#wcm-survey-target-id> (last accessed April 7, 2020).

than reported—we have allegations before us that requests by detainees for COVID-19 tests have not been granted, despite explicit knowledge that the virus has entered the Facilities. (Doc. 6, Ex. 7).

We also have further declarations that no effective containment measures have been put into place to protect Petitioners.<sup>7</sup> Officers and medical staff, who regularly leave the confines of the Facilities and have ample opportunities to contract the virus elsewhere, do not reliably wear gloves and masks when interacting with inmates. (Doc. 3, Ex. 17; Doc. 3, Ex. 16, Doc. 3, Ex. 4; Doc. 3, Ex. 8; Doc. 3, Ex. 23). Temperature checks are infrequently conducted, even among detainees who had close contact with others who have since tested positive. (Doc. 3, Ex. 23). The cell blocks which housed those who test positive are not thoroughly evacuated and cleaned to prevent the spread. (Doc. 3, Ex. 4). We even have reports that detainees exhibiting COVID-like symptoms are remaining in general housing for days, and that once they are quarantined, no testing is being provided to those who remain. (Doc. 3, Ex. 8).

We have previously discussed in great detail how the incursion of COVID-19 into ICE detention facilities could result in catastrophic outcomes, particularly in light of the grim conditions present in these specific Facilities. *See Thakker* at

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<sup>7</sup> We have previously discussed the overcrowding and unsanitary conditions present at these Facilities. *See Thakker* at 14-15.

14-15. It now seems that our worst fears have been realized—COVID-19 is spreading, and not nearly enough is being done to combat it. We cannot allow the Petitioners before us, all at heightened risk for severe complications from COVID-19, to bear the consequences of ICE’s inaction. We therefore find that irreparable harm faces the Petitioners before us should they contract COVID-19.<sup>8</sup>

### **iii. Likelihood of Success on the Merits**

Petitioners argue that they are “likely to establish a due process violation through conditions of confinement that expose them to the serious risks associated with COVID-19.” (Doc. 6 at 13). For the reasons that follow, we agree.

As we previously stated in *Thakker*, Petitioners must show that their conditions of confinement “amount to punishment of the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). “To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer ‘that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.’” *E. D. v. Sharkey*, 928 F.3d 299, 307 (3d Cir. 2019) (quoting *Hubbard v. Taylor*, 538 F.3d

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<sup>8</sup> Many of our sister courts across the nation have agreed with our conclusion. See *Thakker* at 16-19.

229, 232 (3d Cir. 2008)). We therefore ask whether the conditions imposed are rationally related to a legitimate government purpose. They are not.

We previously held, considering the present living conditions present at the *same detention Facilities* now at issue here, that, “we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would constitute a punishment to Petitioners.” *Thakker* at 20-21. There is no indication that there has been an improvement in conditions at the Facilities. Indeed, all indications point towards the contrary. There are now individuals who have tested positive at both Facilities,<sup>9</sup> and we have further accusations that those situations are not being properly contained.<sup>10</sup> “Considering, therefore, the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-confined, unhygienic spaces.” *Thakker* at 21.

We further note that Respondents previously proffered legitimate government objective holds no greater sway here than it did in *Thakker*. The Respondents had

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<sup>9</sup> *ICE Latest Statement, ICE GUIDANCE ON COVID-19*, <https://www.ice.gov/coronavirus#wcm-survey-target-id> (last accessed April 7, 2020).

<sup>10</sup> *See* Doc. 3, Ex. 17; Doc. 3, Ex. 16, Doc. 3, Ex. 4; Doc. 3, Ex. 8; Doc. 3, Ex. 23 (alleging that proper medical protective equipment is not being used by Facility staff, that temperature checks and COVID-19 testing are not being performed on detainees in close contact with the virus, and that proper cleaning of housing blocks is not taking place).

maintained that “preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective.” (*Thakker*, 20-cv-480, Doc. 35 at 38). However, “we note that ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins. Physical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community. We cannot see the rational basis of such a risk.” *Thakker* at 21-22. We therefore find that Petitioners are likely to succeed on the merits of their due process “conditions of confinement” claim.<sup>11</sup>

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<sup>11</sup> As previously discussed in *Thakker*, we also think it likely Petitioners will prevail under the more exacting Eighth Amendment standards as well. To succeed on an Eighth Amendment conditions of confinement claim, the Petitioners must show: (1) the deprivation alleged must objectively be “sufficiently serious,” and (2) the “prison official must have a sufficiently culpable state of mind,” such as deliberate indifference to the prisoner’s health or safety. See *Thomas v. Tice*, 948 F.3d 133, 138 (3d Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). “COVID-19 has been shown to spread in the matter of a single day and would well prove deadly for Petitioners. Such a risk is objectively ‘sufficiently serious.’” *Thakker* at n.15. Furthermore, we note that authorities can be “deliberately indifferent to an inmate’s current health problems” when they “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). There is no requirement that Petitioners show that “they actually suffered from serious injuries” to succeed on this claim. See *Helling*, 509 U.S. at 33. “The current measures undertaken by ICE, including ‘cohorting’ detainees, are patently ineffective in preventing the spread of COVID-19,” as is now evidenced by multiple positive COVID-19 tests in both Facilities. *Thakker* at n.15.

#### **iv. Balancing of the Equities and Public Interest**

The equities at issue and public interest “weigh heavily in Petitioners’ favor.” *Thakker* at 23. We have already noted that Petitioners face a very real risk of serious COVID-19 complications. We also find that Respondents face very little potential harm from Petitioner’s immediate release. While we “agree that preventing Petitioners from absconding. . . is important, we note that Petitioners’ failure to appear at future immigration proceedings would carry grave consequences of which Petitioners are surely aware. Further, it is our view that the risk of absconding is low, given the current restricted state of travel in the United States and the world during the COVID-19 pandemic.” *Id.*

Finally, the public interest strongly encourages Petitioners’ release. “As mentioned, Petitioners are being detained for civil violations of this country’s immigration laws. Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, ‘the continued detention of aging or ill civil detainees does not serve the public’s interest.’” *Thakker* at 23 (*citing Basank*, 2020 WL 1481503, \*6; *see also Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that “the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19”); *Castillo v. Barr*, CV-20-00605-TJH (C.D. Cal. 2020)). Releasing these high-risk Petitioners, and therefore providing more space for effective social

distancing within the Facilities, will clearly benefit the surrounding areas. Rural hospitals will be less overwhelmed by potential detainee COVID-19 cases and there will be less of a risk that Facilities staff will carry the virus into their homes and communities. “Efforts to stop the spread of COVID-19 and promote public health are clearly in the public’s best interest, and the release of these fragile Petitioners from confinement is one step further in a positive direction.” *Thakker* at 23-24.

### III. CONCLUSION

“In times such as these, we must acknowledge that the *status quo* of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly. We now face a global pandemic in which the actions of each individual can have a drastic impact on an entire community. The choices we now make must reflect this new reality.” *Thakker* at 24.

We have before us clear evidence that the protective measures in place in the York and Pike County prisons are not working. We can only expect the number of positive COVID-19 cases to increase in the coming days and weeks, and we cannot leave the most fragile among us to face that growing danger unprotected.

We are mindful that judicial decisions such as these are both controversial and difficult for the public to absorb. It is all too easy for some to embrace the notion that individuals such as Petitioners should be denied relief simply because they lack citizenship in this country. However, Article III Courts do not operate according to

polls or the popular will, but rather to do justice and to rule according to the facts and the law.

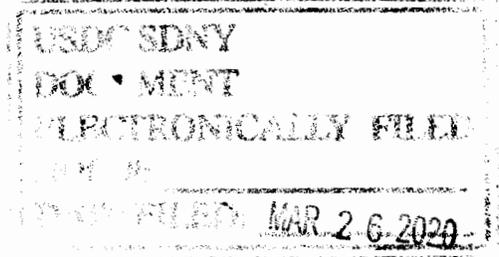
Based on the foregoing, we shall grant the requested temporary restraining order. Respondents, and the York County Prison and Pike County Correctional Facility shall be ordered to immediately release the Petitioners **today** on their own recognizance without fail.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Petitioners' Motion for Temporary Restraining Order, (Doc. 5), is **GRANTED**.
2. Respondents, and the York County Prison and Pike County Correctional Facility **SHALL IMMEDIATELY RELEASE** the Petitioners **TODAY** on their own recognizance.
3. Petitioners will **SELF-QUARANTINE** in their respective homes for **FOURTEEN (14) DAYS** from the date of release.
4. This TRO will expire on April 20, 2020 at 5:00 p.m.
5. No later than noon on April 13, 2020, the Respondents shall **SHOW CAUSE** why the TRO should not be converted into a preliminary injunction.
6. The Petitioners may file a response before the opening of business on April 16, 2020.

s/ John E. Jones III

John E. Jones III  
United States District Judge



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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RONAL UMANA JOVEL, :  
 :  
 : Petitioner, :  
 :  
 : -against- :  
 :  
 : THOMAS DECKER, et al. :  
 :  
 : Respondents. :  
 :  
 :  
----- X

MEMORANDUM DECISION  
AND ORDER

20 Civ. 308 (GBD) (SN)

GEORGE B. DANIELS, United States District Judge:

Petitioner Ronal Umana Jovel seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241, ordering Respondents to provide him with a recorded, individualized hearing before a neutral arbiter. (Pet. for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, ECF No. 1, at 33.) This case was referred to Magistrate Judge Sarah Netburn for Habeas Corpus on January 16, 2020. (Order of Reference to a Magistrate Judge, ECF No. 5.) Magistrate Judge Netburn issued a Report and Recommendation, (the “Report,” ECF No. 26), on March 24, 2020, recommending that Petitioner’s petition be granted. (See Report at 20.) Magistrate Judge Netburn advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections on appeal, and that in light of the “exigencies of the circumstances,” objections to the Report are due by March 31, 2020. (Id.) The parties have not yet filed any objections.

In the meantime, on March 13, 2020, Petitioner filed a letter requesting that the Court order his immediate release “while his petition pends before this Court and while the Coronavirus (‘COVID-19’) public health crisis continues,” pursuant to *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). (Emergency Letter, ECF No. 18.) Magistrate Judge Netburn also included in the Report her recommendation that Petitioner’s emergency request be granted. (See Report at 20.) Upon

conducting an independent analysis of Petitioner's separate application for immediate relief, this Court reaches an independent conclusion that Petitioner's emergency request should be GRANTED.

This Court disagrees with the Government's claim that *Mapp* does not apply in § 1226(c) mandatory detention cases, such as the present. (*See* The Government's Resp. to the Pet'r's Letter of March 13, 2020, Seeking Immediate Interim Relief, and in Further Opp'n to the Pet. for a Writ of Habeas Corpus, ECF No. 20, at 4–5.) The Court in *Mapp* did not consider whether its decision was limited with regard to individuals held under § 1226(c). When a habeas corpus petition raises concerns under *Mapp*, this Court must consider whether the “petition raise[s] substantial claims and [whether] extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective.” *Mapp*, 241 F.3d at 230 (alterations in original) (citations omitted). In other words, to succeed on a claim under *Mapp*, a petitioner must demonstrate that: (1) he or she has set forth substantial claims in the petition; (2) he or she has a likelihood of success on the merits of the petition; and (3) extraordinary circumstances exist, which would require release so that a writ of habeas corpus may be effective. *See Boddie v. N.Y. State Div. of Parole*, No. 8 Civ. 9287 (LAP) (DF), 2009 WL 1531595, at \*1 (S.D.N.Y. May 28, 2009).

The petition sets forth substantial claims, and demonstrates that Petitioner is likely to succeed on the merits. Additionally, in light of the considerable—and growing—concern surrounding the COVID-19 health crisis, including limited access to medical supplies, treatment, and attention, as well as Petitioner's separate personal medical issues, this Court finds that Petitioner has adequately demonstrated extraordinary circumstances requiring his release.

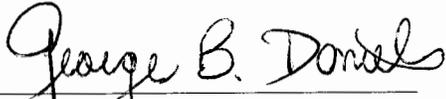
Although this Court finds that Petitioner has met the requirements of the *Boddie* analysis in demonstrating he is entitled to relief under *Mapp*, this Court has not yet fully reviewed the

Report for error in its recommendation that complete habeas relief be granted, and will refrain from doing so until any objections are filed. Indeed, the parties are still granted the right to file prompt objections to Magistrate Judge Netburn's Report and Recommendation that Petitioner's habeas petition be granted, and any failure to file objections by the March 31, 2020 deadline will constitute waiver of those objections on appeal.

Therefore, for the reasons stated herein, Petitioner's emergency application, (ECF No. 18), is GRANTED, pursuant to *Mapp v. Reno*. Petitioner shall be released on his own recognizance by April 3, 2020, while his removal proceedings are pending, unless Respondents provide Petitioner with a bond hearing by that date.

Dated: New York, New York  
March 26, 2020

SO ORDERED.

  
\_\_\_\_\_  
GEORGE B. DANIELS  
United States District Judge

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

_____	:	
RAFAEL L.O., et al.,	:	
	:	Civil Action No. 20-3481 (JMV)
Petitioner,	:	
	:	
v.	:	<b>OPINION</b>
	:	
JOHN TSOUKARIS, et al.,	:	
	:	
Respondent.	:	
_____	:	

**VAZQUEZ, District Judge:**

This matter originated with a Verified Petition for Writ of Habeas Corpus and Complaint. D.E. 1. Presently pending before the Court is the motion of Petitioners’ Rafael L.O.,<sup>1</sup> Adrian E. G.G., and Javier S.M., (“Petitioners”) for a temporary restraining order (“TRO”), immediate release, and/or order to show cause. D.E. No. 5. For the reasons detailed below, the Court will grant the TRO and order Petitioners’ release subject to specific conditions. The filing initially included two additional Petitioners, Victor M.L. and Michael A.G., who have since been released by the Department of Homeland Security, Immigration and Customs Enforcement (“DHS/ICE”). Because those two Petitioners have been released, their motion is dismissed without prejudice.

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<sup>1</sup> Petitioners are identified herein only by their first name and the first initials of their surnames in order to address certain privacy concerns associated with § 2241 immigration cases. This manner of identification comports with recommendations made by the Judicial Conference of the United States’ Committee on Court Administration and Case Management.

## I. Background

Petitioners are immigration detainees being held by ICE at the Essex County Correctional Facility (“ECCF”) in Newark, New Jersey. The instant motion was filed in the wake of the ongoing COVID-19 pandemic,<sup>2</sup> that has been reported to have been contracted by both ECCF personnel and inmates.<sup>3</sup>

Each Petitioner submits that he is living with a medical condition that puts him in danger of severe illness or death should he contract COVID-19. Rafael L.O., who is twenty-seven years old, submits that he has asthma and bi-polar disorder. D.E. No. 1 at 23. Adrian E. G.G., who is forty-six years old, submits that he lives with schizophrenia, diabetes, high cholesterol, and high blood pressure. *Id.* at 25. Finally, Javier S.M., who is fifty-one years old, indicates that he has high blood pressure, high cholesterol, signs of early congestive heart failure, untreated obstructive sleep apnea, and pre-diabetes. *Id.* at 29.

Respondents do not contest Petitioners’ medical conditions. Instead, Respondents argue that ECCF has taken reasonable precautions and that Petitioners’ criminal histories and/or pending criminal charges countenance against release. D.E. 17 at 7-10. Respondents indicate that Rafael L.O. has a 2019 conviction for felony drug offenses and possession of weapon (an air pistol) as

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<sup>2</sup> Covid-19 is an abbreviation of the coronavirus disease 2019, a respiratory illness that can spread from person to person, that was declared a pandemic by the World Health Organization (“W.H.O.”) on March 11, 2020. *See* Centers for Disease Control and Prevention *Coronavirus Disease 2019 Frequently Asked Questions*, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html# covid19-basics> (last visited Apr. 7, 2020); *see also* William Wan, *WHO declares a pandemic of coronavirus disease covid-19*, Washington Post, <https://www.washingtonpost.com/health/2020/03/11/who-declares-pandemic-coronavirus-disease-covid-19/> (last visited April 7, 2020).

<sup>3</sup> Monsy Alvarado, *Second ICE detainee in New Jersey tests positive for coronavirus*, Northjersey.com, <https://www.northjersey.com/story/news/new-jersey/2020/03/26/coronavirus-nj-second-ice-detainee-tests-positive-covid-19/2916525001/> (last visited April 7, 2020).

well as pending felony drug charges from 2018. *Id.* at 7. Javier S.M., Respondents note, has pending state felony charges for criminal sexual contact and endangering/sexual contact. *Id.* at 8. It appears that Javier S.M. was released on his own recognizance by the state criminal court, although Respondents indicate that the state judge may have known that Javier S.M. was to be taken into ICE custody. Adrien E. G.G. has the longest criminal history. Respondents point to numerous convictions between 2013 and 2017 for illegal re-entry into the United States. *Id.* at 9-10. Adrien E. G.G. also has two convictions for drug possession and a 2008 conviction for assault. *Id.*

#### **A. COVID-19**

The COVID-19 pandemic is at the heart of this case. Judge John E. Jones III, in a thoughtful opinion, described the situation as follows:

In a matter of weeks, the novel coronavirus COVID-19 has rampaged across the globe, altering the landscape of everyday American life in ways previously unimaginable. Large portions of our economy have come to a standstill. Children have been forced to attend school remotely. Workers deemed ‘non-essential’ to our national infrastructure have been told to stay home. Indeed, we now live our lives by terms we had never heard of a month ago—we are “social distancing” and “flattening the curve” to combat a global pandemic that has, as of the date of this writing, infected 719,700 people worldwide and killed more than 33,673. Each day these statistics move exponentially higher.

*Thakker v. Doll*, Civ. Docket No. 20-cv-480, 2020 WL 1671563, \*2, \_\_ F. Supp. 3d \_\_ (M.D. Pa. March 31, 2020) (footnotes omitted). Judge Jones accurately pointed to the swift growth of cases. From the date of his opinion (March 31, 2020) to April 7, 2020, the number of worldwide cases and deaths had risen from 719,700 and 33,673 to 1,282,931 and 72,774.4

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4 *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited April 7, 2020).

New Jersey has been particularly hard hit, with the northern part of the state bearing the initial brunt. As of April 7, 2020, New Jersey had 44,416 cases and 1,232 deaths. *COVID-19 Information Hub*, STATE OF NEW JERSEY, <https://covid19.nj.gov/> (last visited April 7, 2020). The total number of cases and deaths for Bergen County, Essex County, and Hudson County, respectively, were 7,533/263, 5,078/232, and 4,949/95 deaths. *Id.* New Jersey has taken numerous steps, such as the Governor’s stay-at-home order on March 21, 2020, to combat the virus. In addition, New Jersey has closed schools indefinitely and closed beaches, state parks, and county parks.<sup>5</sup>

COVID-19 is a type of highly contagious novel coronavirus that is thought to be “spreading easily and sustainably between people.” *How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (“*How Coronavirus Spreads*”) (last visited April 8, 2020). The National Institutes of Health reports that the virus “is stable for several hours to days in aerosols and on surfaces[.]”<sup>6</sup> COVID-19 is “spread mainly from person-to-person.” *How Coronavirus Spreads*. This person-to-person spread can occur (1) between persons who are in close contact, meaning within six feet, and (2) by respiratory droplets when an infected person sneezes, coughs, or talks. *Id.* The virus can also be spread by infected persons who are not showing symptoms. *Id.*

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<sup>5</sup> *New Jersey closes state parks, state forests and county parks as more than 200 new COVID-19 deaths reported*, 6abc, <https://6abc.com/covid19-cases-us-coronavirus-symptoms/6083512/> (last visited April 7, 2020).

<sup>6</sup> *New Coronavirus Stable for Hours on Surfaces*, NATIONAL INSTITUTE OF HEALTH, <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 8, 2020)

Symptoms of COVID-19 can be mild. However, the effects of COVID-19 can be drastically more severe in older individuals or those with certain medical conditions, including persons with asthma, lung disease, heart diseases, diabetes, chronic kidney disease, liver disease or those who are immunocompromised.<sup>7</sup> Besides death, COVID-19 can cause serious, potentially permanent, damage to lung tissue, and can require extensive use of a ventilator. Early evidence suggests that the virus “can damage lung tissue causing a 20 to 30 percent decrease in lung function[.]” D.E. 1 at ¶ 29 (citation omitted). In addition, complications from the virus can manifest rapidly. *Id.* (citation omitted). There is currently no vaccine for COVID-19, nor are there known, clinically-tested therapeutic treatments. *Id.* at ¶ 30. To combat the virus, health officials have emphasized education, social distancing (*i.e.* staying at least 6 feet apart), and improved hygiene. *Id.* (citation omitted).

## **B. ECCF**

County jails were not designed with pandemics in mind. To the contrary, they were made to house persons in relatively close contact. In a densely populated area, like Essex County, New Jersey, jails are constructed to handle more persons, whether they be detainees or inmates. The CDC has warned that the risk of exposure may increase in crowded, closed-in settings with little air circulation if the crowd contains persons who are infected. D.E. 1 at ¶ 32 (citation omitted). COVID-19 represents a threat to detainees, inmates, officers, officials, staff, and all others who enter the jail, such as vendors.

Petitioners cite extensively to a March 19, 2020, letter from two qualified physicians to

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<sup>7</sup> *People Who Are at Higher Risk of Severe Illness*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last accessed April 8, 2020).

members of Congress. D.E. 1-14. Both physicians had “expertise in medical care in detention settings,” and both served as medical subject matter experts for the Department of Homeland Security’s Office of Civil Rights and Civil Liberties.” *Id.* at 1-2. The letter addressed the “imminent risk to the health and safety of immigrant detainees[.]” *Id.* at 3. The physicians stated that “social distancing is essential to slow the spread of the coronavirus to minimize the risk of infection.” *Id.* at 4. The doctors stressed that doing so critically reduces the risk of overwhelming treatment facilities.<sup>8</sup> *Id.* As an example, the physicians pointed out that local hospitals have limited ventilators, and as the hospitals treat more COVID-19 patients, they run the real risk of running short of the life-saving equipment – not only for other virus patients but also for patients with other critical illnesses, such as heart attacks. *Id.* The physicians indicated that three areas of actions were needed: (1) procedures for screening, testing, isolation, and quarantine; (2) limiting the transport and transfer of immigration detainees; and (3) using alternatives to detention to enable as much social distancing as possible. *Id.* at 5. To this end, the doctors emphasized that “*it is essential to consider releasing all detainees who do not pose an immediate risk to public safety.*” *Id.* (emphasis in original). At a minimum, the doctors added, ICE should consider releasing all detainees in high risk medical groups. *Id.* at 5-6.

In response to the pandemic, ICE has taken affirmative steps to lessen the risk of exposure. *ICE Guidance on COVID-19*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/coronavirus> (last visited on April 8, 2020). For example, ICE temporarily suspended all social visitation at detention facilities. *Id.* ICE also released approximately 160

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<sup>8</sup> Petitioners point out that New Jersey officials have projected a potential shortage of 123,000 hospital beds in the coming weeks. D.E. 1 at ¶ 27 (citation omitted).

individuals who were over the age of 60 or pregnant. *Id.* ICE further instituted screening guidance for new detainees and indicates that it is testing detainees for COVID-19 as per CDC guidance. *Id.*

As of the filing of Petitioner's case, four employees and one ICE detainee had contracted COVID-19. D.E. 1 at ¶ 2. Given the incubation period, Petitioners indicate that it is likely that the ICE detainee contracted the virus while at the ECCF. *Id.* at ¶ 38. Prior to the current pandemic, Petitioners noted that DHS's Office of Inspector General ("OIG") "identified serious issues relating safety, security, and environmental health" at ECCF. *Id.* at 41 (citation omitted). The OIG concluded that based on the conditions observed, "ICE cannot ensure detainee health at the [ECCF]." *Id.* at 41.

Petitioners also provide their view of current conditions at the ECCF, relying on a declaration of Rosa Santana, a Program Director at First Friends of New Jersey and New York. D.E. 1-9. Santana indicates, based on her personal experience, that in the "dorms" area of ECCF, "approximately 70 detainees sleep, eat, and spend the vast majority of their time . . . in one room together[.] . . . They all share one bathroom with just a few toilets, sinks and showers." *Id.* at ¶ 7. In the "pods" area of ECCF, two detainees share a room to sleep, but "approximately 125 detainees share a single common space" where they eat and socialize. *Id.* at ¶ 8. Santana adds that these detainees share a bathroom with four showers, but often one or two of the showers are not working. *Id.* Santana and her organization hear constant complaints about the "lack of access to medical care and the quality of care that is received," that medical treatment is denied, or that detainees wait an inordinate amount of time in response to medical requests. *Id.* at ¶¶ 9, 12. Santana is also aware of "unsanitary and unhygienic conditions at the ECCF," such as maggots in the sink or broken boilers. *Id.* at ¶ 10. Detainees also report that they lack sufficient soap, hand sanitizer,

and cleaning supplies; if they run out of money, the detainees cannot buy new soap from the commissary. *Id.* at ¶ 13. As for a detainee who tested positive for COVID-19, Santana knows that the detainee was in a setting with approximately 40-50 other detainees. *Id.* at ¶ 17. Santana has also been receiving recent calls from detainees who are worried that others housed with them are infected as they have sore throats, coughs, and fevers. *Id.* at 20.

Respondents submitted a declaration from Alfaro Ortiz, the Director of the ECCF. D.E. 17-1. On the date of Ortiz's declaration, April 6, 2020, two ICE detainees had tested positive for COVID-19 as had seven inmates in a different building, ten members of the ECCF correctional staff, and one nurse. *Id.* at ¶ 22. Ortiz details the efforts of ECCF to deal with the virus. Ortiz reports that ECCF is currently at seventy-five percent of its capacity and that dorms that were designed to hold sixty detainees now house a maximum of forty-eight. *Id.* at ¶¶ 4-5. He states that ECCF has provide informational hand-outs as to COVID-19 and that detainees have space to "sit at least six feet apart." *Id.* at ¶ 6. Health care at ECCF is administered by CFG Health Systems, with a physician on-site for sixteen hours a day (and available twenty-four hours) as well as nurse practitioner and two RNs and LPNs at all times. *Id.* at 9-10. New detainees are "screened for disabilities upon admission and their temperatures are checked." *Id.* at ¶ 8. ECCF is able to re-circulate air within the facility every four hours. *Id.* at ¶ 13. Among other measures instituted in response to COVID-19, ECCF educates detainees as to the "importance of hand washing and best practices to prevent the spread of COVID-19" and provides detainees daily access to sick call. *Id.* at ¶ 15. ECCF also sanitizes its kitchen hourly, hired additional cleaning staff, and implemented health screening for officers. *Id.* New detainees are quarantined for 14 days. *Id.* If a detainee exhibits COVID-19 symptoms, he or she is medically evaluated and provided a surgical mask. *Id.* at ¶ 17. Detainees with moderate to severe symptoms are

immediately taken to University Hospital, while those with mild symptoms are quarantined. *Id.* at ¶ 18. As of April 6, ECCF had 85 inmates and detainees in quarantine. *Id.* at 19. Detainees who have had a known exposure to COVID-19 but who are asymptomatic are “cohorted,” meaning that they are placed with other similar individuals for fourteen days. *Id.* at ¶ 20.

Petitioners assert numerous counts. D.E. 1. As pertinent here, Petitioners assert a violation of substantive due process for failure to reasonable provide safety and protect from harm. *Id.* at 38.

## II. LEGAL STANDARD

The standard for granting a temporary restraining order is the same as that for a preliminary injunction. Injunctions and restraining orders are governed by Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1. Injunctive relief may only be granted when a party demonstrates that he has a reasonable probability of success on the merits, he will suffer immediate and irreparable harm if the injunction does not issue, the grant of preliminary relief will not result in greater harm to the nonmoving party, and the injunctive relief is in the public interest. *New Jersey Retail Merchants Ass’n v. Sidamon-Eristoff*, 669 F.3d 374, 385-86 (3d Cir. 2012) (citing *Crissman v. Dower Down Entm’t Inc.*, 239 F. 3d 357, 364 (3d Cir. 2001)).

As to the Court’s authority to grant release on a writ of habeas corpus, Petitioner’s rely extensively on the Third Circuit’s decision in *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986). *Lucas* concerned a state prisoner’s petition pursuant to 28 U.S.C. § 2254 rather than a civil immigration detainee matter. *Id.* at 365-66. The court in *Lucas* determined that the “extraordinary circumstances” standard controlled in determining whether “bail may be granted to a habeas petitioner prior to a ruling on the merits of the petition.” *Id.* at 367. As an example of such circumstances, the *Lucas* court pointed to *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955),

in which the district judge had ordered a state inmate released to enter a hospital because the inmate was extremely ill. *Id.* at 366-67. Yet, the court in *Lucas* court continued, it was not suggesting that a petitioner's poor health would be the only situation that would meet the extraordinary circumstances standard. *Id.* at 367.

Like injunctive relief in general, granting bail to a habeas petitioner is an extraordinary remedy. *See Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992) (indicating that a court may only grant release pending a disposition of federal habeas claims when the petitioner has raised "substantial constitutional claims upon which he has a high probability of success, and ... when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective") (citation omitted)); *see also In re Souels*, 688 Fed. App'x 134, 135-36 (3d Cir. 2017).

### III. DISCUSSION

The Court finds that Petitioners have established a reasonable likelihood of success on the merits and similarly met the extraordinary circumstances standard. This determination also addresses Respondents' threshold argument that Petitioners lack standing. D.E. 17 at 24. Respondents argue that "Petitioners do not allege that they have contracted COVID-19, have been exposed to anyone with COVID-19 or that they have suffered any adverse outcomes from the spread of COVID-19." *Id.*

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lance v. Coffman*, 549 U.S. 437, 439 (2007). Standing to sue is a "[c]omponent of the case-or-controversy" requirement. *Id.* Thus, a court must dismiss a case for lack of subject matter jurisdiction if a plaintiff lacks Article III standing. *Finkelman v. Nat'l Football League*, 810 F.3d 187, 195 (3d Cir. 2016). To establish Article III standing, a plaintiff

“must demonstrate ‘(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.’” *Id.* at 193 (quoting *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 358–59 (3d Cir. 2015) (internal quotation marks omitted and punctuation modified)). The first element, an injury-in-fact, requires that a plaintiff show “ ‘the invasion of a concrete and particularized legally protected interest’ resulting in harm ‘that is actual or imminent, not conjectural or hypothetical.’ ” *Id.* (quoting *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014)). Moreover, a plaintiff “must clearly and specifically set forth facts sufficient to satisfy . . . standing” as “a federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The Court finds that Petitioners have standing in light of the Supreme Court’s decision in *Helling v. McKinney*, 509 U.S. 25 (1993). In *Helling*, a prisoner alleged that his Eighth Amendment rights had been violated because he had been exposed to environmental tobacco smoke in prison. *Id.* at 28. The Supreme Court ruled as follows:

We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement *that is sure or very likely to cause serious illness and needless suffering the next week or month or year.* In *Hutto v. Finney*, 437 U.S. 678, 682, we noted that inmates in punitive isolation were crowded into cells and that some of them *had infectious maladies* such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, *even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.* We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. *Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.*

That the Eighth Amendment *protects against future harm* to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is “reasonable safety.” *DeShaney*[ *v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200 (1989)]. It is “cruel and unusual punishment to hold convicted criminals in unsafe conditions.” *Youngberg v. Romeo*, 457 U.S. 307, 315–316 (1982). *It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event.* Two of them were cited with approval in *Rhodes v. Chapman*, 452 U.S. 337, 352, n. 17 (1981). *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), held that inmates were entitled to relief under the Eighth Amendment when they proved threats to personal safety from exposed electrical wiring, deficient firefighting measures, and *the mingling of inmates with serious contagious diseases with other prison inmates.* *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980), stated that a prisoner need not wait until he is actually assaulted before obtaining relief. . . . We thus reject petitioners' central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment.

*Id.* at 33-34 (emphases added). Although decided in the context of an Eighth Amendment claim, the quoted language applies with equal force here. Petitioners do not need to actually show that they have COVID-19 to establish standing.

To succeed on a Fifth Amendment due process claim, Petitioners must show that their conditions of confinement “amount to punishment of the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Third Circuit has articulated the following relevant standards:

To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer “that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.”

*E. D. v. Sharkey*, 928 F.3d 299, 307 (3d Cir. 2019) (quoting *Hubbard v. Taylor*, 538 F.3d 229, 232 (3d Cir. 2008)). As a result, the Court must ascertain whether the confinement conditions serve a legitimate purpose and whether the conditions are rationally related to that legitimate purpose. *Hubbard* 538 F.3d at 232.

District Courts have reached different conclusions when conducting this inquiry in the context of the current pandemic. In *Dawson v. Asher*, Case No. C20-0409, 2020 WL 1304557 (W.D. Wash. March 19, 2020), Judge James L. Robart found that the immigration detainees did not face improper punishment. *Id.* at \*2. Judge Robart explained that the petitioner's detention was reasonably related to a legitimate governmental objective because there was no evidence that the respondents intended to punish the petitioners, respondents had a legitimate governmental objective in preventing detained aliens from absconding and ensuring their appearance at removal proceedings, and the petitioners' confinement did not appear excessive in relation to the legitimate objective. *Id.*

Judge Jones in *Thakker* reached a different conclusion. *Thakker*, 2020 WL 1671563, \*8. Judge Jones noted that an express intent to punish was not necessary and then found that the detention in question did not bear a rational relationship to a legitimate government objective. *Id.* Judge Jones reasoned that housing immigration detainees in close proximity and in unsanitary conditions, in light of the pandemic, did not meet a legitimate governmental objective. *Id.* Judge Jones indicated that preventing aliens from absconding would constitute a legitimate governmental aim but this objective was deeply weakened in light of COVID-19, particularly when ICE had many other options to monitor civil detainees. *Id.*

The Court agrees with the analysis in *Thakker*. The Court does not find that Respondents have an express intent to punish Petitioners, but also finds that such intent is not a necessary

prerequisite. In addition, the Court would – in normal circumstances – agree with the legitimate governmental objective analysis espoused in *Dawson*. But these are not normal times, and context (or factual reality) is important. To use an extreme hypothetical, consider if civil detainees were being housed in a facility that was in the direct path of a hurricane and that the facility was unlikely to withstand the force of the storm. The government would still have a legitimate governmental interest in ensuring that the detainees appeared for immigration court – but the government would not have a legitimate interest in housing the detainees in that particular facility during the hurricane. COVID-19, and its associated risks, is the difference maker – it changes the equation in evaluating the government’s legitimate objectives. See *United States v. Martin*, No. 19 Cr. 140-13, 2020 WL 1274857, at \*2 (D. Md. Mar. 17, 2020) (“[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness.”).

Petitioners’ medical maladies put them in a vulnerable population as to COVID-19. If they do become infected, not only will they be in greater physical jeopardy but they also would put greater pressure on limited medical resources. If the Court credits Rosa Santana’s declaration, ECCF is clearly an unsafe environment. But even viewing Director Ortiz’s statements, obvious gaps exist. ICE detainees are still housed together, up to forty-eight in a room. While Director Ortiz indicates that ECCF has increased its cleaning capability, notably absent from his declaration are critical areas. Detainees may be advised of the risks of COVID-19, but what are they provided to prevent infection? Director Ortiz does not speak to actual personal hygiene items – such as soap – that are provided to detainees and how often detainees can actually wash. In this regard,

Santana's comments about lack of soap and basic hygiene items, along with mass use of limited bathroom and shower facilities, goes unchallenged. While cleaning may be increased, how often are the surfaces, to which the detainees are regularly exposed, properly disinfected?

The Court is not criticizing ECCF or ICE. Both have taken affirmative steps to address the pandemic for which they should be commended. However, there are certain realities that neither ECCF or ICE can overcome. As noted, jails were not designed to fight pandemics, and, unfortunately, such facilities can become perfect vessels for virus transmission. When this case was filed, on April 1, 2020, Petitioners were aware of five cases of COVID-19 in ECCF. Five days later, when Director Ortiz signed his declaration, that number had grown to twenty persons. Petitioners have shown a reasonable likelihood of success on the merits.

Next, the Court assesses whether the irreparable harm necessary for the grant of the injunction exists. "In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm." *Instant Air Freight Co. v. C. F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989) (internal citations omitted). When analyzing whether irreparable harm exists, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *See id.*, quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1964).

The Court has already explained the seriousness of the Covid-19 pandemic and its rapid proliferation in this nation. Nonetheless, the Court will provide these sobering nationwide and county-wide confirmed case and death rates as a reminder. As of April 8, 2020, the United States has 425,000 confirmed cases and more than 14,000 deaths.<sup>9</sup> And in what is New Jersey's second-most afflicted county, Essex, there are 5,078 confirmed cases and 232 deaths.<sup>10</sup> Even more concerning, the state's projected peak is likely still weeks away.<sup>11</sup>

As noted earlier in this opinion, in addition to the volume of ECCF detainees confined to inherently limited living and sleeping quarters, they also appear to have limited access to hygiene products and must share bathroom facilities with a large number of persons. Moreover, given the timing of the first confirmed case at ECCF, it appears the detainee contracted the virus while in ECCF's jurisdiction.

The previously described conditions of confinement raise serious concerns about the ability to stop transmission of the virus. With the conditions as currently described, at-risk detainees – including Petitioners -- cannot practically adhere to social distancing guidelines or the adequate level of personal hygiene, that have been touted as the most effective means to thwart the spread of the virus. Against this backdrop, Petitioners have demonstrated irreparable harm should they remain in confinement. *See Thakker*, 2020 WL 1671563 at \*7 (“[C]atastrophic results may ensue,

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<sup>9</sup> *US coronavirus predictions are shifting. Here's why*, CNN, <https://www.cnn.com/2020/04/08/politics/what-matters-april-8/index.html> (last accessed Apr. 8, 2020, 11:57 p.m.).

<sup>10</sup> *New Jersey coronavirus death toll now at 1,232. Total cases rise to 44, 416 with 3K new positive tests*, NJ.com, <https://www.nj.com/coronavirus/2020/04/new-jersey-coronavirus-toll-now-at-1232-total-cases-rise-to-44416-with-3k-new-positive-tests.html> (last accessed Apr. 9, 2020, 12:15 a.m.).

<sup>11</sup> *Id.*

both to Petitioners and to the communities surrounding the Facilities.”); *see also Hope v. Doll*, Civ. No. 1:20-562 J.E.J. (M.D. Pa. Apr. 7, 2020) (“We cannot allow the Petitioners before us, all at heightened risk for severe complications from COVID-19, to bear the consequences of ICE’s inaction.”) The Court therefore finds that Petitioners have demonstrated irreparable harm should they remain in ECCF.

The Court is also satisfied that the balance of harms would weigh in favor of Petitioners given their underlying health conditions. “Before granting an injunction, a district court must balance the relative harm to the parties, *i.e.*, the potential injury to the plaintiff if an injunction does not issue versus the potential injury to the defendant if the injunction is issued.” *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (internal citation omitted). Here, the potential injury to the Petitioners is grave in light of their health conditions. This Court has already provided a glimpse of the rate at which the virus has spread thus far, even throughout the segment of the state’s population that is at liberty—the living conditions of those detained creates a more untenable situation. Yet, ICE undoubtedly has a legitimate interest in ensuring that the petitioners do not flee and in protecting the public. However, the Court believes that it can address those very important interests in fashioning appropriate conditions of release for each Petitioner.

When considering whether the specific action taken by the court serves the public interest, the guiding principle is assessing whether “not that justice be done, but that specific acts presumptively benefitting the public not be halted until the merits could be reached and a determination made as to what justice required.” *Continental Group, Inc., v. Amoco Chemicals Corp.*, 614 F.2d 351, 358 (3d Cir. 1980). Clearly the public has an interest in preventing the further spread of COVID-19. Prevention, among other things, preserves critical medical

resources necessary to combat the pandemic. Here, the possibility of a widespread outbreak within ECCF would only increase the onus on the state and country's already-overburdened healthcare system. Indeed, as of April 6, 2020, ECCF already had twenty-reported cases. The public has an interest that limited health care resources are available as necessary – which means preventing as many COVID-19 cases as possible – but particularly those necessary for vulnerable persons.

At the same time, the public also has an interest in ensuring that Petitioners do not commit any offenses while on release. Both Rafael L.O. and Adrian E. G.G. have felony convictions, although neither have convictions for offenses of which violence is an element, save Adrian E. G.G.'s conviction twelve years ago. Javier S.M. does not have any felony conviction, but he is facing serious charges in New Jersey. Yet, this Court must acknowledge that the state court released Javier S.M. on his own recognizance. To this end, the Court considers the government's requests completely reasonable, with certain modifications. D.E. 22. Petitioners argue that these limitations are too severe. Yet, the Court notes that the critical argument on which Petitioners rely is that they are unusually vulnerable to COVID-19. In line with that argument, the Court's conditions of release not only protect the public but also protect the Petitioners.

#### **IV. Conclusion**

For the foregoing reasons, the Court will grant Petitioner's motion for a TRO (D.E. No. 5), and order Petitioners' released subject to the conditions as ordered. An appropriate Order accompanies this Opinion.

Dated: 4/9/2020

  
JOHN MICHAEL VAZQUEZ  
United States District Judge



rights experts, (Doc. 36), as well as a factual update and supplemental authority filed by Petitioners. (Docs. 33 and 34). Thus, this matter is ripe for our review.

For the reasons that follow, the temporary restraining order shall be granted and the Respondents shall be directed to immediately release Petitioners today on their own recognizance.

## **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Petitioners are a diverse group of individuals from around the world who are being held in civil detention by Immigration and Customs Enforcement (ICE) at York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility, (“the Facilities”), while they await final disposition of their immigration cases.

Each Petitioner suffers from chronic medical conditions and faces an imminent risk of death or serious injury if exposed to COVID-19. Thakker is 65 years old and suffers from high blood pressure and cholesterol and has kidney failure. Further, he is currently suffering from symptoms similar to those of COVID-19. (Doc. 2, Ex. 3). Idowu, 57, had type II diabetes as well as high blood pressure and cholesterol. He is also currently sick. (Doc. 2, Ex. 4). Stubbs is 52 years old and is immunocompromised due to a kidney transplant he received 6 years ago. He has a heart stent and also suffers from type II diabetes and blood clots. (Doc. 2, Ex. 5). Hernandez, 52, suffers from diabetes, dental problems and an

ulcer. (Doc. 2, Ex. 7). Juarez, 21, suffers from diabetes and is currently sick with COVID-19 type symptoms, including trouble breathing. (Doc. 2, Ex. 8). Lin is 45 years old and suffers from chronic pain due to a forced sterilization, as well as chronic hepatitis B and liver disease. (Doc. 2, Ex. 9). Pratt, age 50, suffers from diabetes and high blood pressure. (Doc. 2, Ex. 10). Augustin, 34 years old, suffers from multiple conditions including diabetes, high blood pressure, nerve pain, limited mobility and pain from a prior bladder and intestine reconstruction, anemia, PTSD and depression. (Doc. 2, Ex. 11). Oyediran is a 40-year-old asthmatic suffering from high blood pressure and cholesterol. (Doc. 2, Ex. 12). Lopez, age 51, has contracted the flu four times while in ICE custody since November of 2018 and is concerned that he is especially susceptible to contracting COVID-19. (Doc. 2, Ex. 15). Finally, Hillocks, age 54, has been diagnosed with leukemia. He also suffers from diabetes, anemia, high blood pressure and cholesterol. (Doc. 2, Ex. 16).

Several Petitioners have reported symptoms similar to those of COVID-19. None have been quarantined, isolated, or treated. (Doc. 2 Exs. 3; 4; 8).

Named as Respondents are: Clair Doll, Warden of York County Prison; Angela Hoover, Warden of Clinton County Correctional Facility; Craig A. Lowe, Warden of Pike County Correctional Facility; Simona Flores-Lund, Field Office Director, ICE Enforcement and Removal Operations; Matthew Albence, Acting

Director of ICE; and Chad Wolf, Acting Secretary of the Department of Homeland Security.

## II. DISCUSSION

In a matter of weeks, the novel coronavirus COVID-19 has rampaged across the globe, altering the landscape of everyday American life in ways previously unimaginable. Large portions of our economy have come to a standstill. Children have been forced to attend school remotely. Workers deemed ‘non-essential’ to our national infrastructure have been told to stay home. Indeed, we now live our lives by terms we had never heard of a month ago—we are “social distancing” and “flattening the curve” to combat a global pandemic<sup>2</sup> that has, as of the date of this writing, infected 719,700 people worldwide and killed more than 33,673.<sup>3</sup> Each day these statistics move exponentially higher. It is against this increasingly grim backdrop that we now consider the Petitioners’ claims for habeas relief.

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<sup>2</sup> The World Health Organization (“WHO”) officially declared COVID-19 as global pandemic on March 11, 2020. *See WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION, (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>3</sup> *See Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last accessed March 31, 2020).

### **A. Threshold Questions: Standing and the Propriety of a Habeas Petition**

Respondents raise two threshold challenges to the Petitioners' Motion. First, Respondents contend that Petitioners lack standing because they have not alleged an injury in fact. Next, Respondents submit that Petitioners cannot challenge their conditions of confinement through a habeas petition. Taking the latter challenge first, we note that federal courts, including the Third Circuit, have condoned conditions of confinement challenges through habeas. *See Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir. 2014); *see also Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242-44 (3d Cir. 2005); *see also Ali v. Gibson*, 572 F.2d 971, 975 n.8 (3d Cir. 1978). Accordingly, we find that Petitioners have appropriately invoked this court's jurisdiction through a 28 U.S.C. § 2241 petition for writ of habeas corpus.

Respondents' standing challenge can also be easily resolved. Respondents essentially contend that because the Petitioners themselves do not have COVID-19 and their likelihood of contracting the illness is speculative, Petitioners cannot establish that they would suffer a concrete, non-hypothetical injury absent a temporary restraining order. However, as the Supreme Court observed in *Helling v. McKinney*, 509 U.S. 25, 33 (1993), "it would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." The COVID-19 pandemic is moving rapidly and expansively throughout Pennsylvania. Vast regions of the

Commonwealth are now under stay-at-home orders, and social distancing the norm to prevent the spread of this deadly virus. And yet, Respondents would have us offer no substantial relief to Petitioners until the pandemic erupts in our prisons. We reject this notion. Since “[a] remedy for unsafe conditions need not await a tragic event,” it is evident that the Petitioners have standing in this matter. *Id.*

## **B. Temporary Restraining Order**

### **i. Legal Standard**

Courts apply one standard when considering whether to issue interim injunctive relief, regardless of whether a petitioner requests a temporary restraining order (“TRO”) or preliminary injunction. *See Ellakkany v. Common Pleas Court of Montgomery Cnty.*, 658 Fed.Appx. 25, 27 (3d Cir. July 27, 2016) (applying one standard to a motion for both a TRO and preliminary injunction). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Apple Inc. v. Samsung Electronics Co.*, 695 F.3d 1370, 1373–74 (Fed. Cir. 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008)).

The Supreme Court has emphasized that “a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the

movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Apotex Inc. v. U.S. Food and Drug Admin.*, 508 F.Supp.2d 78, 82 (D.D.C. 2007) (“Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly.”). “Awarding preliminary relief, therefore, is only appropriate ‘upon a clear showing that the plaintiff is entitled to such relief.’” *Groupe SEC USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter*, 555 U.S. at 22).

## **ii. Irreparable Harm**

To succeed on their Motion, Petitioners “must demonstrate. . .the probability of irreparable harm if relief is not granted.” *Frank’s GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (internal quotations omitted). “In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial”. . .the temporary restraining order. . .“must be the only way of protecting the plaintiff from harm.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). The moving party must demonstrate that it is likely to suffer “actual or imminent harm which cannot otherwise be compensated by money damages,” or it “fail[s] to sustain its substantial burden of showing irreparable harm.” *Frank’s GMC*, 847 F.2d at 103. The mere risk of injury is insufficient. The moving party must establish that the harm is imminent and

probable. *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997). Additionally, “a showing of irreparable harm is insufficient if the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of immediate irreparable harm.” *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992).

The Petitioners’ claim is rooted in imminent, irreparable harm. Petitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable due to age and underlying medical conditions. At this point, it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein. It is not unlikely that COVID-19 is already present in some county prisons—we have before us declarations that portions of the Facilities have been put under ineffective quarantines due to the presence of symptoms similar to COVID-19 among the inmate population.<sup>4</sup> Indeed, we also have reports that a correctional officer at Pike has already tested positive for COVID-19. (Doc. 33 at 1).

Public health officials now acknowledge that there is little that can be done to stop the spread of COVID-19 absent effective quarantines and social distancing procedures. But Petitioners are unable to keep socially distant while detained by

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<sup>4</sup> We also have allegations that prison guards have shown symptoms while interacting with inmates.

ICE and cannot keep the detention facilities sufficiently clean to combat the spread of the virus. Based upon the nature of the virus, the allegations of current conditions in the prisons, and Petitioners' specific medical concerns, detailed below, we therefore find that Petitioners face a very real risk of serious, lasting illness or death. There can be no injury more irreparable.

**a. Seriousness of the virus**

COVID-19 is a type of highly contagious novel coronavirus that is thought to be "spreading easily and sustainably in the community."<sup>5</sup> Experts believe that it can live on some surfaces for up to 72 hours after contact with an infected person.<sup>6</sup> A simple sneeze or brush of the face without washing your hands is now known to easily spread the virus, which generally causes fever, cough, and shortness of breath. (*How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL; Doc. 12 at 15).

In most people, these symptoms are relatively mild. (Doc. 12 at 15). However, the effects of COVID-19 can be drastically more severe in older individuals or those with medical conditions. (Doc.2, Ex. 2). In some cases, COVID-19 can cause serious, potentially permanent, damage to lung tissue, and

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<sup>5</sup> *How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (last accessed March 31, 2020).

<sup>6</sup> *New Coronavirus Stable for Hours on Surfaces*, NATIONAL INSTITUTE OF HEALTH (March 17, 2020), <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces>.

can require extensive use of a ventilator. (*Id.*). The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. (*Id.*). These long-term consequences and the likelihood of fatality increase in those of advanced age and those with other medical conditions, like the Petitioners here. (*Id.*). For those in high-risk categories, the fatality rate is thought to be approximately fifteen percent. (*Id.*).

There is currently no vaccine for COVID-19, nor are there known, clinically-tested therapeutic treatments. (*Id.*). As a result, public health officials have touted the importance of maintaining physical separation of at least six feet between individuals, now commonly known as “social distancing.” (*Id.*). Experts have also emphasized that proper hand hygiene with soap and water is vital to stop the spread. (*Id.*). Beyond these measures, health professionals can do little to combat this highly infectious disease. (*Id.*).

#### **b. Prevalence of the virus**

The United States now records more confirmed cases of COVID-19 than any other country in the world.<sup>7</sup> As of the date of this writing, there were in excess of

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<sup>7</sup> Nicole Chavez, Holly Yan, and Madeline Holcombe, *US has more Known Cases of Coronavirus than any Other Country*, CNN, <https://www.cnn.com/2020/03/26/health/coronavirus-thousand-deaths-thursday/index.html> (last accessed March 31, 2020).

164,458 cases of the virus in America, with 3,167 fatalities.<sup>8</sup> This represented an increase of 2,651 cases in only *twenty-four hours*. (*Id.*)

Indeed, Pennsylvania currently reports 4,087 confirmed cases of COVID-19, with 48 fatalities.<sup>9</sup> Troublingly, that number represents nearly double the confirmed cases reported a mere four days ago—on March 27, 2020, Pennsylvania reported a total of 2,218 cases, with 22 deaths. *Id.* The three counties which house the Facilities are located in York County, Pike County, and Clinton County. They currently report a total of 93 cases: 54 in York County and 39 in Pike County.<sup>10</sup> Clinton County has not yet reported any confirmed cases of COVID-19. *Id.* As of March 27, 2020, the Governor of Pennsylvania placed both York County and Pike County under a stay-at-home order in an attempt to slow the spread of the virus.<sup>11</sup>

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<sup>8</sup> Niko Kommenda, Pablo Gutiérrez, and Juweek Adolphe, *Coronavirus Map of the US: Latest Cases State by State*, THE GUARDIAN, <https://www.theguardian.com/world/ng-interactive/2020/mar/27/coronavirus-map-of-the-us-latest-cases-state-by-state> (last accessed March 31, 2020).

<sup>9</sup> *Coronavirus (COVID-19): Pennsylvania Overview*, PENNSYLVANIA DEPARTMENT OF HEALTH, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last accessed March 31, 2020).

<sup>10</sup> *Coronavirus (COVID-19): Pennsylvania Overview*, PENNSYLVANIA DEPARTMENT OF HEALTH, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last accessed March 31, 2020).

<sup>11</sup> *Governor Wolf and Health Secretary Expand ‘Stay at Home’ Order to Nine More Counties to Mitigate Spread of COVID-19, Counties Now Total 19*, WEBSITE OF THE GOVERNOR OF PENNSYLVANIA, <https://www.governor.pa.gov/newsroom/governor-wolf-and-health-secretary-expand-stay-at-home-order-to-nine-more-counties-to-mitigate-spread-of-covid-19-counties-now-total-19/> (last accessed March 31, 2020).

Average Pennsylvanians in these counties can no longer leave their homes for anything but essential trips to gather supplies, medications, or to perform work essential to our national infrastructure—COVID-19 spreads so easily and rapidly that public health officials have determined that social isolation is necessary to keep our hospital systems from becoming overwhelmed. *Id.* The same rationale applies, perhaps even more so, to immigration detention facilities housing high-risk populations.

**c. Unique nature of detention facilities**

Various public health officials have warned that the nature of ICE detention facilities makes them uniquely vulnerable to the rapid spread of highly contagious diseases like COVID-19. COVID-19 is transmitted primarily through “close contact via respiratory droplets produced when an infected person coughs or sneezes.” (Doc. 12 at 18; Doc. 2, Ex. 1). Immigration detention facilities are particularly at risk for such close contact because they are considered “congregate settings, or places where people live or sleep in close proximity.” (Doc. 2, Ex. 1). Such conditions provide “ideal incubation conditions” for COVID-19. (*Id.*).

Within the past few weeks, two medical experts for the Department of Homeland Security authored a letter to Congress warning of the unique dangers COVID-19 poses to ICE detention facilities. Specifically, they described the current ICE detention environment as a “tinderbox” in which:

[a]s local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community. . . To be more explicit, a detention center with a rapid outbreak could result in multiple detainees — five, ten or more — being sent to the local community hospital where there may only be six or eight ventilators over a very short period. . . As [hospitals] fill up and overwhelm the ventilator resources, those ventilators are unavailable when the infection inevitably is carried by staff to the community and are also unavailable for all the usual critical illnesses (heart attacks, trauma, etc).<sup>12</sup>

The experts contrasted this scenario with a situation in which ICE detainees were released from “high risk congregate settings,” allowing the “volume of patients sent to community hospitals to level out,” which they believed would provide much more favorable outcomes, both for the detainees and the surrounding communities. *Id.* “At a minimum,” these health experts urged, the government “should consider releasing all detainees in high risk medical groups such as older people and those with chronic diseases.” *Id.* ICE detention facilities, they warned, are so poorly equipped to allow safe social distancing practices and are unlikely to have the ability to provide adequate medical care in the case of a COVID-19 outbreak. *Id.* The consequences, they maintain, could be disastrous. *Id.*

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<sup>12</sup> Catherine E. Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN, <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/> (last accessed March 28, 2020).

Indeed, we have before us declarations stating that such high-risk conditions are present in the detention facilities at issue in this case. Both Petitioners and lawyers familiar with the ICE facilities at issue here have attested to overcrowding that makes social distancing impossible at all three facilities. At the York facility, for example, inmates are housed in dormitory-style conditions, in which 60 people reside in each housing block. (Doc. 2, Ex. 18). That space is used for both eating and sleeping. (*Id.*). Petitioners report that not even the medical staff wear gloves when in contact with inmates. (Doc. 2, Ex. 11). Detainees must eat their meals four-to-a-table, with approximately three feet of space between individuals. (*Id.*).

At Clinton, inmate bunks are often less than two feet apart, and inmate declarations show that it is difficult to keep more than a two feet distance between inmates, let alone the recommended six feet. (Doc. 2, Ex. 10). The laundry facilities at Clinton are also reported to be chronically broken, preventing detainees from keeping their clothes and bedding clean. (*Id.*). Indeed, for a total of 72 men, Clinton provides only four sets of sinks and showers. (*Id.*). The Facility is also reported to have bugs mice, and rats, which add to the unsanitary conditions experienced by detainees. (*Id.*).

At Pike, detainees share eight-by-ten or twelve foot cells with two other men. (Doc. 2, Ex. 13). Those cells also contain a sink and a shower. (*Id.*). Some men at Pike report being forced to share cells with other individuals currently exhibiting

COVID-19 symptoms or report exhibiting symptoms themselves while housed with other inmates. (Doc. 2, Exs. 3; 4; 8). Inmates at Pike are also usually forced to remain within two feet of other individuals, even while in the common areas of the facility. (Doc. 2, Ex. 4). They are also required to buy their own soap, are not given hand sanitizer, and are forced to share cleaning supplies with an entire block of cells. (Doc. 2, Exs. 3; 13).

ICE guidance states that these types of risks are mitigated by quarantining detainees with symptoms and by housing those with a higher risk of exposure separately from the rest of the detainee population. (Doc. 2, Ex. 1). The Respondents further proffer that the Facilities are practicing “cohorting,” an “infection prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic.” (Doc. 35 at 12). This practice is meant to last for fourteen days, the duration of the virus’s incubation period. The Petitioner’s declarations, however, show that these practices are not being followed. At least two Petitioners aver that they are experiencing symptoms and have not been isolated from other individuals. (Doc. 2, Exs. 3; 4; 8). Furthermore, all Petitioners have a higher risk of exposure, and none have been moved to separate housing. Indeed, it does not even seem that ICE is providing detainees with proper information on how they can combat the virus on their own. (Doc. 2, Ex. 3). Troublingly, some facilities seem to have shut off detainee access to news outlets,

thereby preventing the detention facility's population from informing themselves on best practices to prevent transmission. (Doc. 2, Ex. 5).

**d. Petitioners are at uniquely high risk for contracting COVID-19**

Not only are the Facilities themselves uniquely suited to rapidly spread COVID-19, but also Petitioners themselves are members of high-risk groups that are likely to feel the effects of the virus more keenly than the average individual.<sup>13</sup> Each of the Petitioners before us has an underlying medical condition that heightens their risk of serious COVID-19 effects, among them asthma, diabetes, heart conditions, hepatitis, and immunocompromising conditions such as leukemia and organ transplants.

**e. The threat to high-risk individuals posed by COVID-19 constitutes irreparable injury**

Various courts across the nation have found that COVID-19, coupled with the lack of hygiene and overcrowding present in detention facilities, will pose a greatly heightened risk to inmates. *See Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir.

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<sup>13</sup> *People at Risk for Serious Illness from COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Mar. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (“Older people and people of all ages with severe underlying health conditions—like heart disease, lung disease and diabetes, for example—seem to be at higher risk of developing serious COVID-19 illness”); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Mar. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html> (stating that “moderate to severe asthma,” “heart disease,” “obesity,” and “diabetes” are conditions that trigger higher risk of severe illness from COVID-19).

Mar. 23, 2020) (“[I]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court.”); *United States v. Stephens*, No. 15 Cr. 95, 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (“[I]nmates may be at a heightened risk of contracting COVID-19 should an outbreak develop.”); *United States v. Garlock*, 18 Cr. 418, 2020 WL 1439980, at \*1 (N.D. Cal. Mar. 25, 2020) (“By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. Notably, the chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual.” (citations omitted)).

Courts have also acknowledged the particular risks facing older inmates and those with underlying medical conditions. *See United States v. Martin*, No. 19 Cr. 140-13, 2020 WL 1274857, at \*2 (D. Md. Mar. 17, 2020) (“[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial

detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness.”). At least one court has ordered the release on bail of an inmate facing extradition on the basis of the risk the pandemic poses to his health. *Matter of Extradition of Toledo Manrique*, No. 19 MJ 71055, 2020 WL 1307109, at \*1 (N.D. Cal. Mar. 19, 2020) (“These are extraordinary times. The novel coronavirus that began in Wuhan, China, is now a pandemic. The nine counties in the San Francisco Bay Area have imposed shelter-in-place orders in an effort to slow the spread of the contagion. This Court has temporarily halted jury trials, even in criminal cases, and barred the public from courthouses. Against this background, Alejandro Toledo has moved for release, arguing that at 74 years old he is at risk of serious illness or death if he remains in custody. The Court is persuaded. The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.”).

Indeed, courts have even specifically held that COVID-19 constitutes an irreparable harm that supports the grant of a TRO. *See Vasif “Vincent” Basank, et al v. Decker*, 2020 WL 1481503 at \*4-5 (S.D.N.Y. March 26, 2020) (“The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO”); *Castillo v.*

*Barr*, CV-20-00605-TJH (C.D. Cal. 2020) (granting a TRO to immigration detainees due to the COVID-19 pandemic); *see also Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (finding irreparable harm “premised ... upon [the district court’s] finding that [Petitioner] was subject to risk of injury, infection, and humiliation”); *Mayer v. Wing*, 922 F. Supp. 902, 909 (S.D.N.Y. 1996) (“[T]he deprivation of life-sustaining medical services. . .certainly constitutes irreparable harm.”).

The painful new reality is that we are constantly at risk of contracting a deadly virus and are experiencing previously unimagined safety measures to stop its spread. This virus spares no demographic or race and is ruthless in its assault. The precautions being adopted to stop it should apply equally, if not more so, to the most vulnerable among us. Petitioners have shown that adequate measures are not in place and cannot be taken to protect them from COVID-19 in the detention facilities, and that catastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities. We therefore find that the likely irreparable injury to Petitioners, as high-risk individuals, satisfies the first element of our TRO analysis.

### **iii. Likelihood of Success on the Merits**

Petitioners argue that their continued incarceration in ICE detention facilities exposes them to serious risks associated with COVID-19 which violate their due

process rights. (Doc. 2 at 27). We find that Petitioners are likely to succeed on the merits of their claim.<sup>14</sup>

To bring a Fifth Amendment due process claim, Petitioners must show that their conditions of confinement “amount[ed] to punishment of the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). “To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer ‘that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.’” *E. D. v. Sharkey*, 928 F.3d 299, 307 (3d Cir. 2019) (quoting *Hubbard v. Taylor*, 538 F.3d 229, 232 (3d Cir. 2008)). In other words, we must ascertain whether the conditions serve a legitimate purpose and whether the conditions are rationally related to that legitimate purpose. *Hubbard* 538 F.3d at 232.

Considering the Facility conditions previously discussed, we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would

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<sup>14</sup> The Respondents argue that Petitioners do not have a legitimate due process claim because they have no “liberty or property interest” in a purely “discretionary grant of humanitarian parole.” (Doc. 35 at 28). We disagree. “Unsanitary, unsafe, or otherwise inadequate conditions” are sufficient to state a Due Process Claim and we shall thus proceed with our analysis. *Petty v. Nutter*, No. 15-3430, 2016 WL 7018538, at \*2 (E.D. Pa. Nov. 30, 2016); *Grohs v. Lanigan*, No. 16-7083, 2019 WL 1500621, at \*11 (D.N.J. Apr. 5, 2019) (“extreme heat combined with lack of potable water, as well as generally unsanitary conditions” are sufficient to state a conditions-of-confinement claim).

constitute a punishment to Petitioners. Despite the Respondents' protests to the contrary, we need not find that the Facilities had the "express intent" to punish Petitioners with the conditions alleged. (Doc. 35 at 37). Instead we ask whether the conditions are rationally related to a legitimate government objective. *Hubbard* 538 F.3d at 232. Here, they are not.

The Respondents maintain that "preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective." (Doc. 35 at 38). They cite a great deal of authority supporting this point, and we do not disagree. (*Id.*). However, we cannot find that unsanitary conditions, which include overcrowding and a high risk of COVID-19 transmission, are rationally related to that legitimate government objective.

Social distancing and proper hygiene are the *only* effective means by which we can stop the spread of COVID-19. Petitioners have shown that, despite their best efforts, they cannot practice these effective preventative measures in the Facilities. Considering, therefore, the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-confined, unhygienic spaces.

The global COVID-19 pandemic and the ensuing public health crisis now faced by American society have forced us all to find new ways of operating that prevent virus transmission to the greatest extent possible. We expect no less of ICE.

We note that ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins.

Physical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community.

We cannot see the rational basis of such a risk.<sup>15</sup>

We therefore find that Petitioners are likely to succeed on the merits of their due process claim that their conditions of confinement expose them “to serious risks associated with COVID-19.” (Doc. 2 at 35).

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<sup>15</sup> Moreover, not only have Petitioners established a likelihood of success on the merits on their Fifth Amendment claim, but, in fact, they have also demonstrated that their claim is likely to be successful under the more exacting Eighth Amendment standards as well. To succeed in proving that conditions of confinement violate the Eighth Amendment, a plaintiff must show: (1) the deprivation alleged must objectively be “sufficiently serious,” and (2) the “prison official must have a sufficiently culpable state of mind,” such as deliberate indifference to the prisoner’s health or safety. See *Thomas v. Tice*, 948 F.3d 133, 138 (3d Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). COVID-19 has been shown to spread in the matter of a single day and would well prove deadly for Petitioners. Such a risk is objectively “sufficiently serious.” Furthermore, the Supreme Court has recognized authorities can be “deliberately indifferent to an inmate’s current health problems” where they “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). There is no requirement that Petitioners show that “they actually suffered from serious injuries” to succeed on this claim. See *Helling*, 509 U.S. at 33. Instead, if Petitioners can show that the conditions “pose an unreasonable risk of serious damage to their future health,” they may succeed on their claim. *Helling*, 509 U.S. at 35) (alteration omitted). The current measures undertaken by ICE, including “cohorting” detainees, are patently ineffective in preventing the spread of COVID-19. Indeed, we now have reports of a positive test amongst the employees at Pike County prison, thereby greatly increasing the likelihood that COVID-19 is present in the prison population.

#### **iv. Balancing of the Equities and Public Interest**

The equities at issue and public interest weigh heavily in Petitioners' favor. First, and as described, Petitioners face irreparable harm to both their constitutional rights and their health. Second, we find that the potential harm to the Respondents is limited. While we understand and agree that preventing Petitioners from absconding and ensuring their presence at immigration proceedings is important, we note that Petitioners' failure to appear at future immigration proceedings would carry grave consequences of which Petitioners are surely aware. Further, it is our view that the risk of absconding is low, given the current restricted state of travel in the United States and the world during the COVID-19 pandemic.

Finally, the public interest favors Petitioners' release. As mentioned, Petitioners are being detained for civil violations of this country's immigration laws. Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, "the continued detention of aging or ill civil detainees does not serve the public's interest." *Basank*, 2020 WL 1481503, \*6; *see also Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that "the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); *Castillo v. Barr*, CV-20-00605-TJH (C.D. Cal. 2020). Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest, and

the release of these fragile Petitioners from confinement is one step further in a positive direction.

### **III. CONCLUSION**

In times such as these, we must acknowledge that the *status quo* of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly. We now face a global pandemic in which the actions of each individual can have a drastic impact on an entire community. The choices we now make must reflect this new reality.

Respondents' Facilities are plainly not equipped to protect Petitioners from a potentially fatal exposure to COVID-19. While this deficiency is neither intentional nor malicious, should we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result. Our Constitution and laws apply equally to the most vulnerable among us, particularly when matters of public health are at issue. This is true even for those who have lost a measure of their freedom. If we are to remain the civilized society we hold ourselves out to be, it would be heartless and inhumane not to recognize Petitioners' plight. And so we will act.

Based on the foregoing, we shall grant the requested temporary restraining order. Respondents, and the York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility shall be ordered to immediately

release the Petitioners **today** on their own recognizance without fail.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Petitioners' Motion for Temporary Restraining Order, (Doc. 7), is **GRANTED**.
2. Respondents, and the York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility **SHALL IMMEDIATELY RELEASE** the Petitioners **TODAY** on their own recognizance.
3. This TRO will expire on April 13, 2020 at 5:00 p.m.
4. No later than noon on April 7, 2020, the Respondents shall **SHOW CAUSE** why the TRO should not be converted into a preliminary injunction.
5. The Petitioners may file a response before the opening of business on April 10, 2020.

s/ John E. Jones III

John E. Jones III  
United States District Judge